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82-977
No._____

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF APPELLANT LABOR ORGANIZATIONS

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY
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QUESTIONS PRESENTED

1. Does a state public employee bargaining law violate the First and Fourteenth Amendments to the United States Constitution where it requires a public employer to formally meet and confer with an exclusive bargaining representative of professional employees, and permits that exclusive representative to retain control over the selection of persons to participate on behalf of the employees in meet and confer activities?

2. Did the district court abuse its discretion in awarding plaintiffs 20 percent of their costs in this case?

PARTIES TO THE PROCEEDING

The caption of this case which contains the names of all parties to the proceeding before the three-judge United States District Court whose judgment on the above-stated questions Appellants seek to have reviewed is as follows:

Leon W. Knight, Morgan Kjer, Donald A. Dahlin, James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, David R. Grout, Joan M. Farkas, Gary Lee Nelson, Ronald Lievense, Lucille Johnson, Virginia E. Lanegran, Max A. Malmquist, Ralph G. Powell, Richard D. Isenhart, Cresston Gackel, Plaintiffs.

v.

Minnesota Community College Faculty Association; Minnesota Education Association; Independent Minnesota Political Action Committee for Education; National Education Association; James A. Norman, individually and in his former official capacity as President, Minnesota Community College Faculty Association; James K. Durham, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; Robert Bell, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; Calvin Minke, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; Ralph S. Chesebrough, individually and in his official capacity as Executive Secretary, Minnesota Community College Faculty Association; Donald Holman, individually and in his official capacity as Minnesota Education Association Representative, Minnesota

Community College Faculty Association; William M. Mondale, individually and in his former official capacity as President, Minnesota Education Association; James Rosasco, individually and in his former official capacity as President, 1973-1974, Minnesota Education Association; Alfred F. Provo, individually and in his former official capacity as Treasurer, Minnesota Education Association; Albert L. Gallop, individually and in his official capacity as Executive Director, Minnesota Education Association; Fulton B. Klinkerfues, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; Janet R. Morgan, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; John W. Schutt, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; James A. Harris, individually and in his former official capacity as President, National Education Association; Helen D. Wise, individually and in her former official capacity as President, 1973-74, National Education Association; Catherine O'C. Barrett, individually and in her former official capacity as President, 1972-1973, National Education Association; Terry E. Herndon, individually and in his official capacity as Executive Secretary, National Education Association; Sam E. Lambert, individually and in his former official capacity as Executive Secretary, 1972-1973, National Education Association; Raymond Crippen, Rosemary McVay, John Sontorovich, Hugh V. Plunkett III, Arleene Nycklemoe, Douglas Alan Bruce, Ronald H. Denison, Edward G. Ziegler, Val Bjornson, Charles Swanson, in-

dividually; Phillip C. Helland, individually and in his official capacity as Chancellor of the Minnesota Community Colleges; John F. Helling, individually and in his official capacity as President, North Hennepin Community College; Dale A. Lorenz, individually and in his official capacity as President, Normandale Community College; Neil Christenson, in his official capacity as President, Anoka-Ramsey Community College; Wayne S. Burggraaff, in his official capacity as Minnesota Commissioner of Finance; James Lord, in his official capacity as Minnesota State Treasurer; Peter Obermeyer, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; Willard H. McGuire, in his official capacity as President, National Education Association; Roger Johnson, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; Donald C. Hill, in his official capacity as President, Minnesota Education Association, Toyse Kyle, Elma Ponto, Joseph Norquist, Nadine Chase, Paul Brinkman, in their official capacities as members of the Minnesota State Board for Community Colleges, Defendants.

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INTRODUCTION

The Minnesota Community College Faculty Association (MCCFA), the Minnesota Education Association (MEA) and the National Education Association (NEA), defendants below, have appealed portions of the final order of the United States District Court for the District of Minnesota entered

on March 31, 1982, and reaffirmed by an order entered on August 13, 1982. The parts of the court's orders appealed from are:

1. The court's ruling that an exclusive bargaining representative may not retain exclusive control over selection of the membership of meet and confer committees (Sections 1, 2 and 3 of the court's Order for Judgment); and

2. The court's ruling that 20 percent of plaintiffs' costs be taxed against the MCCFA and the Minnesota State Board of Community Colleges.

The MCCFA, MEA and NEA (hereinafter referred to collectively as "the appellant labor organizations") submit this jurisdictional statement to show that the Supreme Court has jurisdiction over this appeal, and that a substantial question has been presented.

CITATION TO OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It is set forth in the Appendix to the Jurisdictional Statement of Appellant State Board for Community Colleges (hereinafter "State Board") at p. A-7.[1] The District Court's Findings of Fact are set forth in that Appendix at p. A-32.

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[1] All references to pages in the Appendix contained herein are references to the Appendix previously submitted by the other Appellant before the Court, the State Board.

JURISDICTION

This action was commenced by plaintiffs pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986, and 1994 alleging violations of their rights under the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. The action sought an injunction restraining the enforcement and operation of a state statute, and thus a three-judge district court panel was established pursuant to 28 U.S.C. §§ 2281 and 2284.

The district court issued its order granting in part and denying in part the relief sought by plaintiffs on March 31, 1982. Motions for relief from judgment, for a new trial and to alter or amend the judgment by both plaintiffs and defendants were denied by the court on August 13, 1982. The appellant labor organizations filed a notice of appeal with the United States District Court for the District of Minnesota on October 12, 1982.

The Supreme Court is vested with jurisdiction over this appeal by 28 U.S.C. § 1253.

THE STATUTE INVOLVED

The district court declared unconstitutional, as applied, certain provisions of the Minnesota Public Employment Labor Relations Act (hereinafter "PELRA"), Minn. Stat. 179.61-179.76 (1980). Pertinent portions of PELRA are set forth in the Appendix.

In addition, the appellant labor organizations' appeal of the district court's cost award to plaintiffs involves Rule 54(d), Fed. R. Civ. P., which provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs

shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

STATEMENT OF THE CASE

The primary question presented to the Court by this appeal concerns the constitutionality of portions of the Minnesota Public Employment Labor Relations Act, Minn. Stat. 179.61-179.76 (1980). PELRA establishes a comprehensive framework for collective bargaining by Minnesota public employees. The appellees, plaintiffs below, are public employees under PELRA who are employed as instructors by appellant State Board. The appellant labor organizations include the MCCFA, which is the certified bargaining representative of all instructors employed by the State Board, and two affiliated organizations, the Minnesota Education Association and the National Education Association.

The framework established by PELRA borrows in certain respects from familiar principles of labor law established in the private sector. In particular, PELRA embraces the concept of exclusivity of the certified exclusive representative. The statute sets forth procedures, supervised by a state agency (the Bureau of Mediation Services), to assure the fair selection of an employee organization as exclusive representative by a majority of the employees in an appropriate bargaining unit. Minn. Stat. 179.67, Appendix at A-91-95. Once certified, the employee organization under PELRA, like that in the private sector, has the exclusive right and duty to represent

all employees in the bargaining unit in the negotiation of terms and conditions of employment. The statute specifically prohibits a public employer from meeting and negotiating with anyone other than the exclusive representative. Pursuant to PELRA, the State Board and the MCCFA have negotiated several successive collective bargaining agreements covering terms and conditions of employment.

Also similar to the private sector, PELRA restricts the duty to negotiate imposed on the public employer to those matters which are "terms and conditions of employment," a phrase defined by the statute. Minn. Stat. 179.63, subd. 18, Appendix at A-89. The public employer is not required to meet and negotiate concerning matters of "inherent managerial policy" which under law include "such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel." Minn. Stat. 179.66, subd. 1, Appendix at A-90-91.

While not required to negotiate concerning managerial policies, the public employer is required by PELRA to "meet and confer" with representatives of its professional employees concerning all matters relating to employment which are not within the scope of mandatory bargaining. Minn. Stat. 179.66, subd. 3, Appendix at A-91. Meet and confer is defined as "the exchange of views and concerns between employers and their respective employees." Minn. Stat. 179.63, subd. 15, Appendix at A-89. Even professional employees who have determined not to collectively bargain terms and conditions of employment have the right to meet and confer through a selected representative. Minn. Stat. 179.73, Appendix at A-95. Where a collective bargaining representative has been chosen, however, that "meet and negotiate" representative is also the "meet and confer" representative because the principle of

exclusivity applies to the meet and confer function, and the employer must only engage in formal meet and confer with the exclusive representative. Minn. Stat. 179.66, subd. 7, Appendix at A-91. PELRA preserves the right of the individual employee to express views, grievances, complaints or opinions concerning employment related matters. Minn. Stat. 179.65, subd. 1, Appendix at A-89-90.[2]

In the context of the instant case, the lower court found that the exclusive representative, through the meet and confer process, has replaced the "faculty senates" which had prior to PELRA served as the vehicle through which community college instructors, on an organized and formal basis, expressed views to the community college administration. Prior to PELRA, the elected faculty senates communicated with the administration concerning matters now negotiable, as well as matters which continue to be recognized as within the province of employer discretion, *e.g.* curriculum matters, degree requirements, academic standards and general budget and planning issues on the campuses. Findings of Fact, Appendix at A-48-49. With the certification of the MCCFA as exclusive representative, the formal communication system between faculty and administration concerning the nonbargainable issues has become "meet and confer" sessions[3]

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[2] This right is further buttressed by a recent amendment to PELRA. The Minnesota Legislature amended Minn. Stat. § 179.66, subd. 7, in 1982 by adding the following clause at the end of the existing language: "provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment." Minn. Laws 1982, ch. 568, § 2.

[3] The term "meet and confer" encompasses both local campus level meetings known as "exchange of views" and system-wide level meetings known as "meet and confer."

where the selected representatives of both sides conduct the dialogue. The collective bargaining agreement recognizes the exclusive right of the MCCFA to meet and confer with the State Board. Appendix at A-96-98. The lower court found that faculty who are not on meet and confer committees have the opportunity to and engage in discussions of an informal nature with members of the administration concerning topics covered in meet and confer sessions. Findings of Fact, Appendix at A-49-50.

The primary issue raised before the Court by this appeal results from the MCCFA's practice of appointing only its members to meet and confer committees. Findings of Fact, Appendix at A-50. Instructors in the faculty bargaining unit are free to join or not to join the exclusive representative as members. Appellees are instructors who have chosen not to join the MCCFA. They initiated this action in part to challenge the constitutionality, on First Amendment grounds, of the meet and confer provisions discussed above on both facial and as applied grounds. Appellees' "meet and confer" claim was only a portion of a substantial assault on the overall constitutionality of PELRA, and the ability of the MCCFA to constitutionally act as an exclusive representative of public employees.

The complaint and request for a three-judge district court was filed in the United States District Court for the District of Minnesota on December 19, 1974. After appellees' request for the impaneling of a three-judge court was denied by the district court, the United States Court of Appeals for the Eighth Circuit, on May 17, 1976, reversed and ordered such a three-judge panel established. *Knight v. Alsop*, 535 F. 2d 466 (8th Cir. 1976). Discovery followed, with appellees unsuccessfully seeking appellate relief from certain district

court decisions concerning discovery issues *Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *Knight v. Heaney*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) (denying petition for writ of mandamus) *cert. denied* 449 U.S. 823 (1980). On December 13, 1979, the district court appointed a special master to conduct the trial of this matter. The trial commenced on August 4, 1980, and recommended findings of fact were issued by the special master on March 23, 1981. The district court issued its Findings of Fact on November 16, 1981, and its Memorandum Opinion and Order on March 30, 1982.

Besides the meet and confer issue, appellees raised substantial issues challenging the constitutionality of exclusive representation in collective bargaining under PELRA, and the ability of the MCCFA to constitutionally act as an exclusive representative. The district court's order ruled against appellees on these issues. Further, the court upheld the facial constitutionality of the meet and confer provisions of PELRA. However, the court sustained appellees' contention that it is unconstitutional under the First and Fourteenth Amendments to the United States Constitution for the meet and confer process to operate in a way which excludes instructors who are not members of the MCCFA from participating in the selection of or being eligible for membership on meet and confer committees. In addition, the district court ruled that 20 percent of appellees' costs would be assessed against the State Board and the MCCFA.

QUESTIONS WHICH ARE SUBSTANTIAL

The district court (Judge Earl Larson dissenting) ruled that the "meet and confer" provisions of PELRA are unconstitutional to the extent that the exclusive bargaining representative retains exclusive authority to select faculty members to participate in the meet and confer process and in practice excludes non-members from being on meet and confer committees. The court ruled that the present system was constitutionally offensive because non-members were denied a fair opportunity to participate in the selection of governance representatives. Memorandum Opinion and Order, Appendix at A-22. The lower court's decision is an unwarranted extension of First Amendment rights which interferes with the effective functioning of the exclusive representative, as well as the collective bargaining process.

A. The District Court Decision Improperly Assumes the Existence of First Amendment Interests.

Critical to the lower court's ruling that the meet and confer provisions of PELRA, as applied in the Minnesota community colleges, are unconstitutional, is an incorrect assumption that First Amendment interests are involved in the meet and confer process and that a state must create a "fair selection system" in deciding who it wishes to confer with. In describing the provisions of PELRA which govern selection of meet and confer representatives, the court states:

> Thus, the weight and significance of *individual speech interests* have been consciously derogated in favor of systematic, official expression.

Memorandum Opinion and Order, Appendix at A-20 (emphasis supplied). The court cites as authority decisions of this Court which concern issues of mandatory loyalty oaths for teachers (*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)), compulsory divulgence by teachers of membership in associations (*Shelton v. Tucker*, 364 U.S. 479 (1960)), and intrusion by the state into the content of a professor's lectures (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)). The lower court acknowledges the inapplicability of these cases. Memorandum Opinion and Order, Appendix at A-21. None of the cases in which this Court has addressed the issue of academic freedom as within the protection of the First Amendment support an intrusion into the procedure which a college administration uses to confer with its faculty.

The lower court's assumption that the ability of faculty members to meet and confer with the community college administration implicates First Amendment interests is incorrect. The court has found that the duty of a public employer to meet and confer is of statutory—not constitutional—origin. Findings of Fact, Appendix at A-47. Applied to this case, PELRA's meet and confer provisions mean that the State of Minnesota has decided that it does not wish to formally exchange views and concerns with employees other than through the employees' exclusive representative. The right to free speech does not imply the right to compel a listener. Nor does it imply the right to compel that listener to respond and exchange views. Nothing in the First Amendment commands that committees of Congress or the President listen in person to the views of each citizen, or even each federal employee. Nor must agents be employed for this purpose. Congress and the President each have the right to decide who they wish to confer with. The State of Minnesota has this same right.

Significantly, the meet and confer process pertains only to those subjects which are inherent management policy. This Court has ruled that public employees have no constitutional right to collectively bargain concerning their terms and conditions of employment. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). It stands to reason, therefore, that a right to consult concerning managerial policy decisions does not exist unless granted by statute. District courts have specifically held that faculty members have no constitutional right to participate in a college administration's decision-making process. *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wisc. 1974); *Peacock v. Board of Regents*, 380 F. Supp. 1081 (D. Ariz. 1974).[4]

The lower court primarily relies upon the "tradition of shared decision-making" in the field of higher education as support for its inference of a First Amendment interest in meeting and conferring. Memorandum Opinion and Order, Appendix at A-18-A-22. Appellants do not disagree with the court's assessment that such shared decision-making is a valuable and desirable process. The court's assumption that the First Amendment restricts the way in which the state may structure such shared decision-making, however, is erroneous.

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[4] The lower court acknowledges that meet and confer meetings are not a public forum and therefore no right to participate arises under *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Memorandum Opinion and Order, Appendix at A-22n.18.

B. Even If First Amendment Interests Were Involved, They Are Not Offended by the Present Meet and Confer System.

After assuming the involvement of free speech interests, the lower court acknowledges that the state may properly require that a faculty governance system occur on a representational basis. Indeed, the faculty senates predating PELRA functioned through elected representatives. Findings of Fact, Appendix at A-48-49. The court states that PELRA's requirement that "meet and confer" occur between selected representatives of both sides has no constitutional infirmity; individual faculty members have no First Amendment right to individually "meet and confer" with the administration. Memorandum Opinion and Order, Appendix at A-22.

The court rules, however, that faculty members have a First Amendment right to "a fair opportunity to participate in the selection of governance representatives." Memorandum Opinion and Order, Appendix at A-23. Although such a requirement is questionable, as argued above, in any case it is plain that such a "fair opportunity" exists under PELRA.

Nowhere is the fundamental flaw in the court's decision more obvious than in its statement of the issue before it:

> The issue here is whether faculty members may be excluded from participating in selection of meet and confer representatives and from serving as such representatives, which is a question of first impression.

Memorandum Opinion and Order. Appendix at A-21 n. 16. Non-members of the MCCFA are *not* excluded from participating in the selection of the meet and confer representative. As noted above, PELRA establishes elaborate procedures for the selection of the exclusive representative through a demo-

cratic process supervised by an independent state agency, the Bureau of Mediation Services. All faculty members, regardless of their affiliations, may participate in this process, just as they participated in the process of selecting the faculty senates or councils. The statute also provides that dissatisfied employees may petition for replacement or disestablishment of the exclusive representative. This procedure allows a "fair opportunity to participate in the selection of governance representatives" if the First Amendment be thought to impose such a requirement.

Appellees' complaint arises from the fact that the MCCFA, and not appellees (or any organization they are entitled to form), has been selected by the faculty to be their meet and confer representative. Because the selection of the exclusive representative has occurred on a democratic basis encompassing all faculty, the fact that non-MCCFA members have not, as a matter of practice, been included on meet and confer committees is of no constitutional significance. Certainly a faculty senate may choose its committees from among senate members, without being constitutionally required to appoint faculty members who were not elected to the body. For constitutional purposes, the MCCFA's selection of meet and confer committees is no different.

This argument was noted but not persuasively refutted by the lower court. Memorandum Opinion and Order, Appendix at A-27-A-28. Viewed in this light, the lower court is actually holding that the First Amendment prohibits the state from requiring the selection of a "meet and negotiate" representative and a "meet and confer" representative at the same time, on the same ballot. The court is ruling that professional employees must have separate votes for the "meet and negotiate" and "meet and confer" representatives. Even assuming

that the First Amendment establishes a "fair opportunity to participate" requirement in this context, it is inconceivable that it compels the state to conduct a two-tiered selection process for the two functions. There is no constitutional basis for asserting that the present system for selection of the meet and confer representative is "unfair." *Gonzales v. Irizarry*, 387 F. Supp. 942 (D.P.R. 1974).

The lower court's decision is unassisted by its assertion that the "right [of non-member instructors] to speak out is further impaired by the knowledge that one could be excluded from serving in the process if the MCCFA should desire to retaliate for protected speech activity." Memorandum Opinion and Order, Appendix at A-28. Importantly, the court found no evidence of such retaliation. Findings of Fact, Appendix at A-52. More fundamentally, it is essential to any selection process that the views of the potential representative be taken into account. Certainly instructors voting in the separate meet and confer election envisioned by the lower court's decision would properly consider the views of those running in deciding who to vote for. If not being voted for or selected as a representative because of one's views is termed "retaliation," then such "retaliation" is a fairly common occurrence. If one's desire to be selected inhibits him from speaking his true mind, then such an inhibition can hardly be called unconstitutional. Such "retaliation" and "inhibition," if those labels be used, are inherent in any system for election of representatives.

C. The District Court's Decision Fails to Attribute Proper Significance To the State's Interests In the Present Meet and Confer Structure.

The lower-court acknowledges the compelling state interests supporting the establishment of collective bargaining by public employees over terms and conditions of employment which were recognized by this Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Memorandum Opinion and Order, Appendix at A-11-13. However, the lower court improperly denigrates those interests in ruling that the state may not require that the exclusive representative for "meet and negotiate" be recognized as the exclusive representative for "meet and confer" purposes. The interests which support the rule of exclusivity in negotiating terms and conditions of employment are equally compelling where representation of employee interests in non-negotiable areas are concerned.

The court asserts that, unlike other professional employees, community college faculty members do not need to be represented in meet and confer by the same exclusive representative which negotiates the collective bargaining agreement because of the "tradition of shared decisionmaking" in the community colleges. Memorandum Opinion and Order, Appendix at A-25. Prior to PELRA, the supposed "shared decisionmaking" extended to matters now classified as within and without the scope of mandatory bargaining. The court agrees with the legislature's judgment that the pre-PELRA system provided insufficient opportunity for employee input and therefore justified providing the opportunity for exclusive representation on terms and conditions of employment. The justification for exclusive representation in meet and confer is equally compelling. If pre-PELRA "shared decisionmaking" was in-

adequate for "meet and negotiate" subjects, it was just as inadequate for "meet and confer" topics.

The lower court also asserts that exclusivity is less necessary because "intangible" issues are involved in meet and confer, as opposed to the "tangible fruits" of negotiations over terms and conditions of employment. Memorandum Opinion and Order, Appendix at A-27-28. The labeling of a matter as "intangible" does not make it unimportant. Decisions made as a result of the meet and confer process on such matters as curriculum and overall budget will have substantial impact on the instructors in the bargaining unit. The lower court concedes the importance of these issues by describing meet and confer as an "important academic forum." Memorandum Opinion and Order, Appendix at A-22. A unified faculty voice forwarded by an exclusive representative is just as important where the "intangible" issues of meet and confer are concerned, as in the negotiation of employment conditions.

Finally, contrary to the assertions of the district court, irreconcilable demands may arise in a way which undermines union security if the "meet and negotiate" and "meet and confer" functions are carried out separately. Frequently matters arise which contain elements of both negotiable and non-negotiable subjects. In the private sector, for example, this Court has recognized that while the decision of management to close a plant may be non-negotiable, the impact of that decision is negotiable. *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666 (1981). The Minnesota Supreme Court has recognized a similar "decision-effects" rule in defining the duty to bargain under PELRA in such areas as teacher performance evaluation. *Minneapolis Federation of Teachers v. Minneapolis Special School District No. 1*, 258 N.W. 2d

802 (Minn. 1977). Such a dichotomy may be expected to be recognized in such critical areas as budget retrenchment. With respect to such issues, interaction and overlap between the meet and confer and meet and negotiate dialogues is inevitable. Unless the community college instructors are represented by an exclusive representative in both forums, their voice and ability to influence matters important to their welfare is greatly reduced. At best, the community college administration will face conflicting demands. At worst, the administration will play one group off against the other in order to achieve its own ends. For these reasons, the rationale supporting exclusivity in the formal "meet and confer" process is just as compelling as in the "meet and negotiate" arena.

D. The District Court Abused Its Discretion In Awarding Appellees Twenty Percent of Their Costs.

Based on its ruling in favor of the appellees on the meet and confer issue, the lower court awarded appellees twenty percent of their costs in this matter. Appellant labor organizations appeal this issue on the basis that so great an award of costs amounts to an abuse of discretion.

It is virtually uncontested that the "meet and confer" issue consumed an extremely small portion of the proceedings in this matter. In denying appellants' motion for an amended judgment on the costs issue, the district court stated:

> Defendants' motion to reduce the proportion of costs taxed against them is grounded on their contention that no more than 5-6 percent of the plaintiffs' efforts were expended on the "meet and confer" issue, the one issue on which plaintiffs prevailed. Plaintiffs have not disputed that the "meet and confer" issue was largely a discrete question of law and fact. Nor have they chal-

> lenged defendants' assertions that the "meet and confer" issue was addressed in only 3 percent of plaintiffs' exhibits, 6 percent of the trial transcripts, .004 percent of plaintiffs' proposed stipulations and by none of plaintiffs expert witnesses.

Order, Appendix at A-2. Despite this recognition of the small and discrete nature of the meet and confer issue, the court adhered to its twenty percent cost award. As rationale it offered an observation, inconsistent with the statement quoted above, that there is "overlap between the First Amendment claim as to meet and confer practices and other practices challenged by plaintiffs." Id.

The only overlap between the two claims is that both purported to invoke the same provisions of the Constitution. Beyond that the meet and confer issue had nothing in common with appellees' other claims. The appellees expended enormous time and energy in attempting to prove that the MCCFA, MEA and NEA are an "integrated" organization which is the constitutional equivalent of a "political party" and is engaged in a collective bargaining process which amounts to "fascism". These are matters totally unrelated to the comparatively narrow, though important, meet and confer issue.

The appellants should not, through a cost award, be required even in part to subsidize expensive and protracted litigation of the kind engaged in by appellees below. In describing the conduct of appellee's counsel, the lower court stated:

> Much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding [of *Abood v. Detroit Board of Education, supra.*]

Order, Appendix at A-5 n.2. The court further described appellees' theories as "frivolous" ones which could have been presented without the need for a trial of facts.

> Instead, the development of this theory was muddled with plaintiffs' theory that MCCFA, and probably any public sector union, is the constitutional equivalent of a political party, and was further blurred with repeated incantations that the arrangement under PELRA is the functional equivalent of Italian fascism and the National Industrial Recovery Act. *Indeed, the presentation of plaintiffs' case has hindered rather than helped the court to resolve the issues raised in their complaint.*

Order, Appendix at A-4 (emphasis supplied).

It is recognized that the lower court has substantial discretion in allocating cost awards. However, where the lower court has recognized that a discrete issue consumed substantially less cost than that percentage awarded, and further where the lower court recognized that the proceedings on issues as to which the appellees failed were bloated by the unreasonable conduct of appellees at trial, the lower court has ruled inconsistently and arbitrarily. The twenty percent costs award was an abuse of discretion.

CONCLUSION

The decision by the district court interferes with the statutory structure of employee relations established by the State of Minnesota. It does so by construing the First Amendment to require establishment of certain selection structures in the meet and confer process. Such an interference with the labor relations of the state and its employees is unwarranted and unjustified by the First Amendment and the jurisprudence thereunder. Further, the lower court abused its discretion in requiring appellants to pay twenty percent of appellee's costs in this matter. For these reasons and for the other reasons stated above, the appellant labor organizations request the Court to note probable jurisdiction.

Respectfully submitted,

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SEE COMPANION CASE

Nos. 82-898 & 82-977

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CLERK

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OCTOBER TERM, 1982

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MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,

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Appellees.

On Appeal from the United States District Court for the District of Minnesota

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APPELLEES' MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENTS

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Nos. 82-898 & 82-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees;

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

APPELLEES' MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENTS

INTRODUCTION

Pursuant to this Court's request, Appellees Leon W. Knight, *et alia,* hereby support the Court's assumption of jurisdiction in these cases.

STATEMENT IN SUPPORT OF JURISDICTION

Together with case No. 82-901,[1] cases Nos. 82-898 and 82-977 arise out of the same basic challenge to the exclusive-representation scheme of Minnesota's Public Employment Labor Relations Act (PELRA). The District Court held that this scheme is constitutional in so far as it applies to *negotiations* between the Minnesota Community College Faculty Association (MCCFA) and the Minnesota State Board for Community Colleges (Board), and unconstitutional in so far as it applies to *conferences* between these parties.[2] Leon Knight appealed the first ruling in No. 82-901; and the Board and MCCFA appealed the second in Nos. 82-898 and 82-977.

Just as they invoked this Court's jurisdiction in their own appeal, Appellees emphatically assert that jurisdiction here. Appellees reject any contention that this "appeal is not within this Court's jurisdiction, or * * * not taken in conformity with statute or with [this Court's] Rules".[3] They deny that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".[4] And they admit their inability to offer "any other ground

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[1] Knight v. Minnesota Community College Faculty Ass'n, No. 82-901 (U.S. Sup. Ct., Jurisdictional Statement filed 1 December 1982).

[2] Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges in No. 82-898, at A-8 to A-17, and A-17 to A-29.

[3] Rule 16.1(a) of the Rules of the Supreme Court of the United States. *See* 28 U.S.C. § 1253 (1976).

[4] Rule 16.1(c) of the Rules of the Supreme Court of the United States.

* * * as a reason why the Court should not set the case[s] for argument".[5]

Indeed, because the three companion cases Nos. 82-901, 82-898, and 82-977 involve interrelated constitutional attacks on exclusive representation in public-sector employment, Appellees submit that no reasonable ground exists for the Court to refuse to exercise jurisdiction over any of them. For the stark judicial fact is that *this Court has never sustained exclusive representation, in principle or as applied, in public employment, in private employment, or in any other area of human endeavor.* To the contrary: In every instance where the issue arose, this Court has declared the device, or its applications, unconstitutional.

The leading decision in private employment is *Carter* v. *Carter Coal Co.*[6] As the Court said there, referring to the exclusive-representation labor-provisions of the Bituminous Coal Conservation Act,[7]

> [t]he effect, in respect of wages and hours, is to subject the dissentient minority * * * to the will of the * * * majority * * *.
>
> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[8]

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[5] Rule 16.1(d) of the Rules of the Supreme Court of the United States.

[6] 298 U.S. 238 (1936).

[7] Act of 30 August 1935, ch. 824, 49 Stat. 991.

[8] 298 U.S. at 311.

And, as Chief Justice Hughes added,

> [t]he [majority-rule] provision permits a group of * * * employees, according to their own views of expediency, to make rules as to hours and wages for other * * * employees who are not parties to the agreements. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirements of due process of law.[9]

Self-evidently, the holding in *Carter* is directly relevant to every form of governmentally imposed exclusive representation,[10] and remains as valid and vital today as when enunciated nearly half a century ago.[11] Certainly the application of *Carter* to the PELRA's exclusive-representation scheme is a not "unsubstantial" question that "need[s] further argument".[12]

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[9] *Id.* at 318 (concurring opinion).

[10] *Carter* would not reach purely voluntary arrangements adopting exclusive representation that private employers and unions negotiated under common law or pursuant to merely permissive statutory authority.

[11] The *Carter* Court premissed its holding on earlier decisions in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912). 298 U.S. at 311-12. Since then, these cases have received approbation in many opinions. *E.g.*, Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting) (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 6-7 (1974); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1973); New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 125-26 & n.30 (1978) (Stevens, J., dissenting); McGautha v. California, 402 U.S. 183, 252-54 & nn.2-3, 271-73 & nn.21-22 (1971) (Brennan, J., dissenting).

[12] Appellees intend to defend the District Court's decision in Nos. 82-898 and 82-977 in part on the same grounds that they oppose that Court's ruling in No. 82-901.

After *Carter*, the unconstitutionality of exclusive representation in private employment escaped judicial review on three occasions. When the validity of the National Labor Relations Act [13] was first in issue, the Labor Board selected its test-cases "intentionally [to] avoi[d] presenting the Court with [this] 'touchy' and • • • doubtful questio[n]".[14] And in *NLRB* v. *Jones & Laughlin Steel Corp.*,[15] this Court avoided the problem of *exclusive* representation by interpreting the statute to permit individual employees to bargain directly with their employer over the terms and conditions of their employment.[16] Similarly, in a contemporaneous challenge to the Railway Labor Act [17] in *Virginian Railway* v. *System Federation No. 40*,[18] the Court held that exclusive representation under that statute allowed individual contracts between an employer and its employees.[19] These holdings reflected

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[13] Act of 5 July 1935, ch. 372, 49 Stat. 449, *now* 29 U.S.C. § 151 *et seq.* (1976).

[14] J. A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* (1974), at 187.

[15] 301 U.S. 1 (1937).

[16] *Id.* at 45 (act does not prevent "employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ").

[17] Act of 20 May 1926, ch. 347, 44 Stat. 577, *now* 45 U.S.C. § 151 *et seq.* (1976).

[18] 300 U.S. 515 (1937).

[19] *Id.* at 548-49.

the unanimous position of the litigants on the issue.[20] The later decision in *Steele* v. *Louisville & Nashville Railroad Co.*[21] also pretermitted the question, by creating the "duty of fair representation"—precisely to avoid grappling with serious problems of due process and equal protection that unlimited exclusive representation raised.[22]

In its first decision implicating exclusive representation in public employment, *City of Madison, Joint School District No. 8* v. *WERC*,[23] this Court felt it unnecessary to define "the extent to which true contract negotiations between a public body and its employees may be regulated".[24] But it squarely held

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[20] *See* Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937), at 13, 33-34, 40, 88-89, 118.

Only seven years later, in cases raising issues of statutory construction alone, did this Court purport to re-interpret the National Labor Relations and Railway Labor Acts to preclude individual contracts under some circumstances. J. I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin Steel Corp.* and *Virginian Railway*, although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 745, 789-91 (1940).

[21] 323 U.S. 192 (1944).

[22] *Id.* at 198. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967). *See generally, e.g.*, Weyland, "Majority Rule in Collective Bargaining", 45 *Colum. L. Rev.* 556, 568-69 (1945).

[23] 429 U.S. 167 (1976).

[24] *Id.* at 175.

under the First and Fourteenth Amendments that "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who * * * might wish to express his view about governmental decisions concerning labor relations".[25] More recently, this Court heard oral argument in *Perry Education Association* v. *Perry Local Educators' Association*,[26] a case raising the question of the extent to which an exclusive representative of public-school teachers may constitutionally negotiate special privileges for itself in a collective-bargaining agreement in order to stifle dissent from its policies among employees in its bargaining-unit.

Obviously, these *post-Carter* decisions demonstrate beyond cavil: (i) that this Court has never addressed the constitutionality of exclusive representation itself under a private- or public-sector labor-relations act;[27] and (ii) that this Court has found not "insubstantial" and "need[ful of] further argument" mere secondary effects of exclusivity far less constitutionally significant than the primary issues the parties raise in Nos. 82-901, 82-898, and 82-977.

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[25] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977) (opinion of Stewart, J.).

[26] No. 81-896 (U.S. Sup. Ct., oral argument held 13 October 1982).

[27] Although, strictly speaking, *Carter* turned on the unconstitutionality of the labor-provisions of the Bituminous Coal Conservation Act, to label it solely a "labor-law" decision would nonetheless be misleading, as it dealt more fundamentally with the invalidity of corporative-state arrangements in general. *See* Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1 (Winter 1981), at 56. *See also* P. Bradley, *Constitutional Limits to Union Power* (1976).

CONCLUSION

Appellees therefore urge this Court to take jurisdiction of Nos. 82-898 and 82-977, and set these cases (together with No. 82-901) down for full briefing and oral argument.

Respectfully submitted,

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Nos. 82-977 & 82-898

IN THE

Supreme Court of the United States

October Term, 1983

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF ON THE MERITS OF APPELLANT LABOR ORGANIZATIONS

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QUESTIONS PRESENTED

1. Does a state public employee bargaining law violate the First and Fourteenth Amendments to the United States Constitution where it requires a public community college board to formally meet and confer only with an exclusive bargaining representative of its instructors, and permits that exclusive representative to retain control over the selection of persons to participate on behalf of it in meet and confer activities?

2. If public community college instructors are constitutionally entitled to run and vote in elections for membership on meet and confer committees established by a public employee bargaining law, do the First and Fourteenth Amendments to the United States Constitution require that a system of cumulative voting be used in conducting such elections?

3. Did the district court abuse its discretion in awarding plaintiff-appellees twenty percent of their costs in this case?

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No. 82-977 and 82-898

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

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MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

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Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF ON THE MERITS OF APPELLANT LABOR ORGANIZATIONS

CITATION TO OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It has been unofficially reported at 111 LRRM 3156.

JURISDICTION

This action was commenced by plaintiffs pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986, and 1994 alleging violations of their rights under the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. The action sought an injunction restraining the enforcement and operation of a state statute, and thus a three-judge district court panel was established pursuant to 28 U.S.C. §§ 2281 and 2284.

The district court issued its order granting in part and denying in part the relief sought by plaintiffs on March 31, 1982. Motions for relief from judgment, for a new trial and to alter or amend the judgment by both plaintiffs and defendants were denied by the court on August 13, 1982. The appellant labor organizations filed a notice of appeal with the United States District Court for the District of Minnesota on October 12, 1982.

The Supreme Court is vested with jurisdiction over this appeal by 28 U.S.C. § 1253.

STATUTES INVOLVED

The district court declared unconstitutional, as applied, certain provisions of the Minnesota Public Employment Labor Relations Act (hereinafter "PELRA"), Minn. Stat. §§ 179.61-179.76 (1982). Pertinent portions of PELRA are set forth in the Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges at 87-95.

In addition, the appellant labor organizations' appeal of the district court's cost award to plaintiffs involves Rule 54(d), Fed. R. Civ. P., which provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs

shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

STATEMENT OF THE CASE

This case was initiated by the appellees to challenge certain provisions of the Minnesota Public Employment Labor Relations Act, Minn. Stat. §§ 179.61-179.76 (1982) (hereinafter referred to as "PELRA") as unconstitutional both on their face and as applied. PELRA establishes a comprehensive framework for collective bargaining between public employers and their employees in Minnesota. The appellees, who are public employees, challenged the constitutionality of exclusive representation in collective bargaining under PELRA, the ability of the appellant Minnesota Community College Faculty Association to constitutionally act as the exclusive representative, and the constitutionality of the "meet and confer" procedures established by PELRA. The appellees sought injunctive and declaratory relief against enforcement of the provisions of PELRA pertaining to these issues. The lower court denied the requested relief with one exception: it enjoined PELRA as applied in the area of the "meet and confer" procedures.

Appellee Leon W. Knight and the other plaintiff-appellees (hereinafter collectively referred to as "Knight" or "Knight and his colleagues") are employed as instructors in the Minnesota Community College System (hereinafter "the System"). At the time of trial, the System consisted of eighteen institu-

tions located throughout the State of Minnesota which provide a two-year program of post-secondary education to students. Minn. Stat. § 136.60 (1982). The System is operated by the appellant Minnesota State Board for Community Colleges (hereinafter "State Board"), a state agency composed of citizens appointed by the governor. Minn. Stat. § 136.61 (1982). The State Board selects a chancellor to act as chief executive and operational officer of the System. (R. 395-96).[1] Each community college has a president who reports to the chancellor. (R. 396). The appellant Minnesota Community College Faculty Association (hereinafter "MCCFA") is a labor organization which is certified pursuant to PELRA as the exclusive collective bargaining representative of all instructors employed by the State Board. It is affiliated with appellants Minnesota Education Association and National Education Association (the three organizations shall be referred to collectively as "the appellant labor organizations").

Prior to 1971, the relationship between the instructors and the administration on each campus was largely a local matter. As a result, the level of participation by instructors in the operation of the community colleges varied widely. On some campuses the instructors and the administration discussed campus issues through organizations such as a faculty senate. Other campuses were characterized by the centralization of decision-making in the administration. (A. 46).[2]

In 1971, the State of Minnesota enacted PELRA, which contained provisions with a substantial impact on the relationship between the instructors and the administration. The framework established by PELRA borrows in certain respects

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[1] All references to the trial transcript which have not been reproduced in the joint appendix shall be cited as (R. ——).

[2] All references to the joint appendix shall be cited as (A. ——).

from familiar principles of labor law established in the private sector. In particular, PELRA embraces the concept of exclusivity of the certified exclusive representative. The statute sets forth procedures, supervised by a state agency (the Bureau of Mediation Services), to ensure the fair selection and certification of an employee organization as exclusive representative by a majority of the employees in an appropriate bargaining unit. Minn. Stat. § 179.67 (1982). Once certified, the employee organization under PELRA, like that in the private sector, has the exclusive right and duty to represent all employees in the bargaining unit in the negotiation of "terms and conditions of employment." [3] PELRA specifically prohibits a public employer from meeting and negotiating with anyone other than the exclusive representative.[4] In addition, also similar to the private sector, PELRA restricts the duty to meet and negotiate[5] imposed on the public employers to those matters which are "terms and conditions of employment." The public employer is not required to meet and negotiate concerning matters of "inherent managerial policy," which include "such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel."[6] Pursuant to PELRA, the State Board and the MCCFA have negotiated

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[3] PELRA's definition of "terms and conditions of employment" is found at Minn. Stat. § 179.63, subd. 18 (1982) (Juris. A. 89). All references to the Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges shall be cited as (Juris. A. ——).

[4] Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

[5] PELRA's definition of "meet and negotiate" is found at Minn. Stat. § 179.63, subd. 16 (1982) (Juris. A. 89).

[6] Minn. Stat. § 179.66, subd. 1 (1982) (Juris. A. 90).

successive collective bargaining agreements covering terms and conditions of employment. (Pl. Ex. 1; R. 92).[7]

Unlike the private sector, PELRA also established new rights to participation by professional employees[8] with respect to those matters which are outside the scope of mandatory negotiations but which relate to employment. In this regard, PELRA, at Minn. Stat. § 179.73 (1982), provides:

> Subdivision 1. The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters not specified under section 179.63, subdivision 18 [which defines negotiable "terms and conditions of employment"].
>
> Subd. 2. The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters not specified under section 179.63, subdivision 18, relating to the services being provided to the public. The public employer shall provide the facilities and set the time for such conference to take place, provided that the parties shall meet together at least once every four months.[9]

The statute defines "meet and confer" as "the exchange of views and concerns between employers and their respective

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[7] All references to plaintiffs' trial exhibits shall be cited as "Pl. Ex."

[8] PELRA's definition of "professional employees" is found at Minn. Stat. § 179.63, subd. 10 (1982) (Juris. A. 88).

[9] Other sections of PELRA which emphasize this right are found at Minn. Stat. § 179.65, subd. 3 (1982), Minn. Stat. § 179.66, subd. 3 (1982) (Juris. A. 90-91).

employees." Minn. Stat. § 179.63, subd. 15 (1982). As professional employees, instructors in the System acquired the right to "meet and confer" through a representative with the State Board concerning those matters classified as within the inherent managerial prerogative as a result of PELRA's enactment.

It is clear from the language of Minn. Stat. § 179.73, set forth above, that even professional employees who have determined not to collectively bargain terms and conditions of employment have the right to meet and confer through a selected representative. Where a collective bargaining representative has been chosen, however, that "meet and negotiate" representative is also the "meet and confer" representative. The principle of exclusivity applies equally to the meet and confer function, and thus the employer must only engage in formal meet and confer with the exclusive representative.[10] PELRA specifically preserves the right of individual employees to express views, grievances, complaints or opinions concerning employment related matters.[11]

The implementation of PELRA and the selection of the MCCFA as the exclusive representative caused a restructuring of the relationship between the instructors and the State Board. On those campuses where there had been little or no faculty participation in the governance of the college, PELRA resulted in a dramatic increase in faculty input both in matters covered by meet and negotiate and in matters covered by meet and confer. On those campuses where there had previously been faculty senates or other formal vehicles for

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[10] Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

[11] Minn. Stat. § 179.65, subd. 1 (1982) (Juris. A. 89). This point is emphasized by Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

faculty input, the governance structures were replaced by both the meet and negotiate, and meet and confer procedures. (A. 46-48).

The meet and confer structure which developed is two-tiered, and is set forth in the collective bargaining agreement between the State Board and the MCCFA.[12] On the first level, both the MCCFA and the State Board are represented by statewide meet and confer committees which discuss issues applicable to the entire system. On the second level, the MCCFA chapter at each campus and the administration at each campus are represented by local "exchange of views" ("EOV") committees which discuss issues specific to the particular campus falling within the area of meet and confer. Unlike the state level where there is a single meet and confer team for each side, there will typically be several local EOV committees at a single campus. The committees discuss such designated topics such as "Personnel", "Student Affairs," "Curriculum", "Facilities", "Fiscal Matters" and "General Matters." At some campuses however there are as few as one EOV committee.

As previously noted, the meet and confer committees discuss subjects which are not within the mandatorily negotiable "terms and conditions of employment". Such subjects have included selection and evaluation of community college administrators, planning of new facilities, academic accreditation, and student rights. (A. 41). Meet and confer committees have also discussed interpretation of the collective bargaining agreements resulting from the meet and negotiate process. *Id.*

In choosing individual instructors to represent it on meet and confer committees, the MCCFA has observed the practice

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[12] The provisions of the contract pertaining to meet and confer structure are found in Pl. Ex. 1; R. 92 (A. 35-36).

of selecting only persons who are members of the MCCFA. (A. 43). Under PELRA, public employees are not required to join the organization which acts as their exclusive representative.[13] Non-members may, however, be required to pay a fair share fee to the exclusive representative not to exceed 85 per cent of regular membership dues and not to exceed the amount of regular membership dues less the cost of benefits financed through dues and available only to members.[14]

The establishment of the meet and confer procedure has not prevented instructors, whether they belong to the MCCFA or not, from expressing their views on matters which come before the meet and confer committees. (Juris. A. 50, A. 92-93, 98-100, 130-131, 148-150, 184-189). The State Board and the local administration on each campus regard the MCCFA as the official faculty spokesman, and the position it advocates is considered the official faculty position. (A. 50). Testimony at trial makes clear, however, that the employer recognizes that individual instructors may have different opinions on any given issue. *Id.* A variety of avenues exist and have been utilized for the expression of those individual views. Foremost is the ability of instructors to communicate to individual administrators their views on issues deemed important. (A. 61-62, 72). The college administrators called by Knight at trial testified that such dialogue is a common occurrence. (A. 84-85, 100-102). Furthermore, there are a number of occasions where expression of individual views is invited, including State Board meetings which rotate among the various campuses, and meetings routinely held by college

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[13] Minn. Stat. 179.65, subd. 2 (1982).
[14] Minn. Stat. § 179.65, subd. 2 (1982).

presidents during the school year. (A. 57).[15] Thus, while the meet and confer process gives weight and focus to the faculty position as formulated by the faculty's exclusive representative, all instructors may freely express their views on subjects within the purview of meet and confer, whether those views coincide with the position forwarded by the MCCFA or not.

The primary issue raised before the Court by this appeal results from the MCCFA's practice of appointing only its members to meet and confer committees. The complaint and request for a three-judge district court was filed in the United States District Court for the District of Minnesota on December 19, 1974. After Knight's request for a three-judge panel was denied by the District Court, the United States Court of Appeals for the Eighth Circuit, on May 17, 1976, reversed and ordered such a panel established. *Knight v. Alsop*, 535 F. 2d 466 (8th Cir. 1976). Discovery followed, with Knight unsuccessfully seeking appellate relief from certain district court decisions concerning discovery issues. *Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *In re: Knight*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) (denying petition for writ of mandamus) *cert. denied*, 449 U.S. 823 (1980). On December 13, 1979, the District Court appointed a Special Master to conduct the trial of this matter. The trial commenced on August 4, 1980, and recommended findings of fact were issued by the Special Master on March 23, 1981. (Juris. A. 54). The District Court issued its Findings of Fact on November 16, 1981 (Juris.

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[15] Such occasions include "town meetings" open to all instructors, departmental meetings with the college president, faculty breakfasts and lunches, and being available in the common area of the campus. (A. 61-62, 83-84, 98-100).

A. 32), and its Memorandum Opinion and Order on March 30, 1982. (Juris. A. 7).

In addition to the meet and confer issue, Knight raised substantial issues challenging the constitutionality of exclusive representation in collective bargaining under PELRA, and the ability of the MCCFA constitutionally to act as an exclusive representative. The District Court's order ruled against Knight on these issues. Further, the court upheld the facial constitutionality of the meet and confer provisions of PELRA. The court sustained Knight's contention, however, that it is unconstitutional under the First and Fourteenth Amendments to the United States Constitution for the meet and confer process to operate in a way which excludes instructors who are not members of the MCCFA from participating in the selection of or being eligible for membership on meet and confer committees. In addition, the district court ruled that twenty percent of appellees' costs would be assessed against the State Board and the MCCFA.

Appeals were filed with this Court by the State Board and the appellant labor organizations on November 30, 1982 and December 10, 1982, respectively. The Court noted probable jurisdiction on March 28, 1983, and ordered the two appeals consolidated and set for oral argument.

Prior to this Court noting probable jurisdiction, elections were conducted in the System in which all instructors (MCCFA members and non-members alike) were permitted to nominate candidates, run for election and vote. The elections were for positions on both the statewide and local meet and confer committees. Each voter was required to cast one vote for as many candidates as there were positions to be filled on the various committees. No non-MCCFA members ran for the statewide committee while several did pursue local

EOV positions. The elections resulted in MCCFA members holding all positions on all meet and confer committees.

Knight subsequently moved the district court for relief, claiming that the election procedures were not consistent with the Court's order of March 30, 1982. On April 15, 1983, the Court ruled that the election procedure had failed to provide Knight with a "fair opportunity to select and serve as meet and confer representatives." In order to provide such a fair opportunity, the court ordered that new elections be conducted using a system of cumulative voting. (A. 192-193).

On April 26, 1983, the appellant labor organizations moved this Court for leave to expand the appendix and add the issue of requiring cumulative voting raised by the lower court's April, 1983, order. The Court granted this motion on June 3, 1983.

SUMMARY OF ARGUMENT

The lower court's ruling that PELRA's meet and confer procedure violates the First Amendment improperly assumes the existence of First Amendment interests in two respects. First, it assumes that there is a right under the First Amendment not only to speak, but also to compel the government to listen and to respond. This assumption is contrary to *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). Second, it assumes that the First Amendment limits the discretion of the government in choosing who to confer with concerning policy decisions. This assumption is contrary to *Elrod v. Burns*, 427 U.S. 346 (1976). While the First Amendment may have some impact on rights of access to public forums, and even non-public forums, the meet and confer process is not a forum; it is private consultation by the gov-

ernment. Therefore, there is no First Amendment interest implicated by the meet and confer system.

Even if meet and confer is considered to be a non-public forum, the exclusive right of the MCCFA, as exclusive representative, to meet and confer is reasonable, and is not intended to suppress a speaker's views because a public official disagrees with them. The meet and confer structure therefore meets the standard adopted in *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 74 L.Ed. 2d 794 (1983).

The fact that this case arises in a higher education system does not mean that First Amendment academic freedom principles are implicated. The lower court's assertion that the meet and confer process involves academic freedom issues is premised on an erroneous view of the tradition of faculty participation in the governance of the Minnesota community colleges. Other courts have refused to recognize any First Amendment right to faculty governance. Moreover, by undermining the exclusivity of the MCCFA the lower court's decision detracts from rather than enhances the influence of the faculty in the affairs of the community colleges.

Even if the First Amendment requires that faculty members be extended "a fair opportunity to participate" in the selection of the meet and confer representative, PELRA provides such an opportunity. PELRA provides extensive procedures for the democratic selection of the exclusive representative in which all faculty members, regardless of their organizational affiliations, may participate. Instructors are not compelled to join any association in order to participate in this process. Any pressure which instructors feel to conform their views to those of the majority is inherent in any system for democratic election of representatives.

Compelling governmental interests support PELRA's meet and confer structure, even if First Amendment interests are present and are held to be infringed. These interests include avoiding confusion in presentation of employee views, avoiding subjecting the employer to conflicting demands and minimizing rivalries within the bargaining unit. If separate and independent representatives acted in the meet and confer, and meet and negotiate areas, the resulting conflict and inconsistency would undermine the functioning of both and jeopardize the interest of affording fully effective representation to public employees.

The District Court's supplemental order requiring cumulative voting in the election of meet and confer representatives is wholly unprecedented and exceeds even the measures ordered in the sensitive area of alleged racial discrimination in the election of candidates to public office. The lower court's order improperly suggests a First Amendment right to proportional representation.

The District Court's requirement that the MCCFA and the State Board pay to Knight twenty percent of his costs is an abuse of discretion. The portion of costs awarded bears no rational relationship to the portion of the proceedings on which Knight succeeded. The cost award requires the MCCFA and the State Board to subsidize the unreasonable conduct of Knight and his counsel throughout this case.

ARGUMENT

I. THE DISTRICT COURT'S ORDER THAT PUBLIC EMPLOYEES HAVE A CONSTITUTIONAL RIGHT TO A FAIR OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF A MEET AND CONFER REPRESENTATIVE IS ERRONEOUS.

A. The First Amendment Does Not Entitle Knight To Compel The State Board To Either Listen Or Respond To Him.

The District Court's decision is fundamentally flawed by two assumptions which it makes concerning the role of the First Amendment in private consultations by government policymakers. First, the District Court improperly assumes that Knight has a First Amendment right to exchange views with the State Board. Second, the District Court erroneously assumes that the First Amendment limits the discretion of government policymakers in deciding with whom to consult. Both of these assumptions are not only contrary to the First Amendment principles long established by the Court, but, if adopted, would create enormous practical problems as public officials attempt to satisfy the lower court's standard.

Knight has no First Amendment right to exchange views with the State Board. The First Amendment guarantees to Knight the right to express and publish his views on any subject he chooses, including, obviously, the subjects discussed in meet and confer meetings. The First Amendment does not extend to Knight the right, however, to compel any individual or entity, private or public, to listen to his views or to respond to his views.

It is clear that the District Court's reading of the First Amendment grants to Knight a right to compel the State

Board to both listen to him and to respond to him. This First Amendment right to compel a listener and a response is apparent from the District Court's reliance on the concept of "meaningful expression." The District Court recognizes in both its factual findings and its memorandum opinion that Knight is fully able to express his views at any time on a variety of subjects, including subjects discussed in meet and confer meetings. Further, college administrators have listened and discussed such subjects with Knight and his colleagues on an informal basis. This, the District Court rules, is insufficient because Knight's expression is not a part of the "official" system for faculty expression through the MCCFA to which the State Board and its administrators are by statute required to listen and respond. According to the District Court, Knight is entitled under the First Amendment to "meaningful expression," which consists of a "fair opportunity to participate" in the meet and confer process. (Juris. A. 20, 22-23). Because the essence of the meet and confer process is the right to compel the State Board to both listen and respond concerning matters of "inherent managerial policy" the District Court is holding that Knight's purported First Amendment right to "meaningful expression" entitles him to compel a listener and a response.

Recognition of a Constitutional right to compel a responsive listener is plainly contrary to the decisions of this Court. In *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), the Court rejected the claim that the First Amendment entitled public employees to submit work-related grievances to their employer through a labor union. In its *per curiam* opinion, the Court stated definitively:

> The public employee surely can associate, and speak freely and petition openly, and he is protected by the

> First Amendment from retaliation for doing so. See Pickering v. Board of Education, 391 U.S. 563, 574-575, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); Shelton v. Tucker, 364 U.S. 479, 5 L. Ed. 231, 81 S. Ct. 247 (1960). *But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.*

441 U.S. at 465 (footnotes omitted) (emphasis supplied). The Court also recited with favor language from the Court of Appeals for the Seventh Circuit's decision in *Hanover Federation of Teachers Local 1954 (AFL-CIO) v. Hanover Community School Corporation*, 457 F. 2d 456 (1972):

> The First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective."

441 U.S. at 464-65. Clearly, the First Amendment does not support Knight's claim to "meaningful expression" insofar as that claim extends to the right to compel a responsive listener.

The District Court's decision also depends on the improper assumption that the First Amendment limits the discretion of public officials engaged in policymaking in deciding with whom they wish to consult. It holds that PELRA's requirement that the State Board shall formally meet and confer only with the exclusive representative has resulted in a "practice of systematically excluding non-members of MCCFA" which, it concludes, "deprives such persons of a fair opportunity to participate in the meet and confer process." (Juris. A. 24).

This Court has clearly held that the First Amendment does not interfere with the discretion of the government to choose the persons to perform governmental policymaking functions.

In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court ruled that non-policymaking employees in the Cook County Sheriff's Department could not be terminated because of their political affiliations. The Court also stated that public employees who *are* in policymaking positions, however, *could* be terminated because of their political affiliations. 427 U.S. at 367-68, 372. This principle was reaffirmed in *Branti v. Finkel*, 445 U.S. 507 (1980), where the Court ruled that assistant public defenders could not be discharged because of their political affiliations. The employees at issue in *Branti* were not within *Elrod's* "policymaker" exception because their "primary, if not the only, responsibility . . . is to represent individual citizens in controversy with the State." 445 U.S. at 519. Once again, the Court stated that public employees in policymaking positions could be discharged where "party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

The case at hand is far easier to resolve than the situations presented in *Elrod* and *Branti*. Here there is no question of an employee's termination, or of an employee's right to hold and express any opinion or belief. Knight will continue to hold his position with no adverse impact on his terms and conditions of employment regardless of the views he expresses or publishes. The sole question is the discretion of the State to choose with whom it wishes to privately consult concerning matters of community college policy. As *Elrod* and *Branti* recognize, the First Amendment does not limit that discretion.

As a practical matter, public officials must be granted discretion regarding with whom they wish to confer. It requires no great imagination to perceive the impossible burden which would be placed upon government by requiring as a matter of constitutional law that public officials listen and

respond to private individuals upon demand—or that such individuals be provided a "fair opportunity" to participate in choosing representatives which could then exert such compulsive power. The government must be free to choose without constitutional stricture how and with whom it wishes to conduct private consultations, or government will likely become critically impaired from performing its functions.

Such practicalities are recognized by the decisions of the Court which hold that the government need not create public forums available to any citizen who wishes to express views to public officials. As was observed by Mr. Justice Holmes, the "constitution does not require all public acts to be done in town meeting or assembly of the whole" for there "must be a limit to individual argument in such matters if government is to go on." *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

The Court has held that when a forum is established which is recognized as a public forum through tradition or designation, the government is under First Amendment constraints in excluding persons from voicing their views in that forum. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Board*, 429 U.S. 167 (1976). Even if the government establishes a non-public forum, the regulations concerning its use must be reasonable and not be an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Education Association v. Perry Local Educator's Association*, —— U.S. ——, 74 L. Ed. 2d 794 (1983); *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 131 n. 7 (1981).

The meet and confer process is neither a public forum nor a non-public forum; it is not a forum at all. The meet and confer process is the government's decision to consult with

certain persons prior to making policy decisions that are within its discretion. The state has decided to require the State Board to listen and discuss such issues with the exclusive representative of professional public employees.

This element of consultation distinguishes meet and confer from both the public and non-public forums. There is no dispute that meet and confer is not a public forum, as the lower court specifically so found. (Juris. A. 22, 50).[16] The non-public forums considered by this Court have uniformly involved an asserted claim to use government property (or property peculiarly subjected to government regulation) to communicate to individuals. *See, e.g., Perry Education Association v. Perry Local Educator's Association, supra* (school mail system); *United States Postal Service v. Greenburgh Civic Associations, supra* (government regulated postal letter box); *Greer v. Spock,* 424 U.S. 828 (1976) (military base); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (advertising space on municipal transit); *Adderly v. Florida,* 385 U.S. 39 (1966) (county jail). None of the cases decided in this area have suggested that the government is under any constraints in deciding with whom it wishes to confer. As the Court noted in *City of Madison*:

> Plainly, public bodies may confine their meetings to specified subject matter and may hold non-public sessions to transact business.

429 U.S. at 175 n. 8.

Because Knight has no constitutional right to compel a responsive listener, nor a right to interfere with the state's discretion in choosing with whom to consult, the lower court's decision should be rejected.

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[16] See also discussion, *post,* at p. 21.

B. Even If The Meet And Confer Process Is Treated As A Non-Public Forum, PELRA's Requirement That The State Board Meet And Confer Only With The Exclusive Representative Of Its Professional Employees Is Not Unconstitutional.

The state's decision to engage in formal meet and confer only with the exclusive representative of those professional employees who have decided to collectively bargain is reasonable, and is not an effort to suppress expression merely because the state opposes the excluded speakers' views. For this reason, even if meet and confer is regarded as a non-public forum, it is nevertheless constitutional for the state to restrict access to meet and confer to the exclusive representative of its professional employees, where those employees have selected one.

As noted above, the lower court found that the meet and confer process is not a public forum. (Juris. A. 22, 50). The lower court's conclusion that meet and confer is not a public forum is fully consistent with this Court's analysis in *Perry Education Association v. Perry Local Educator's Association*, —— U.S. ——, 74 L. Ed. 2d 794 (1983).

Having found that meet and confer is not a public forum, however, the lower court committed clear error in ruling that the practice of limiting access to meet and confer to the exclusive representative could only be sustained "if it is supported by compelling, legitimate state interests which cannot be furthered by less intrusive means." (Juris. A. 24). With respect to non-public forums, as noted above, government regulations will be upheld if they are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Education Association*, 74 L. Ed. 2d at 805; *United States Postal Service v. Greenburgh*

Civic Associations, 453 U.S. 114, 131 n. 7 (1981). The state's decision to meet and confer only with the exclusive representative of its professional employees meets this test.

The recent *Perry Education Association* decision is dispositive on this question. There the Court upheld the school district's practice of granting the teachers' exclusive representative, the Perry Education Association ("PEA") access to the school mail system while denying to other teacher organizations similar access. The Court found that the school mail system was not a generally open public forum, but rather was a nonpublic forum which may be reserved for "its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable, and not an effort to suppress expression merely because public officials oppose the speaker's view." 74 L. Ed. 2d at 805. The restriction on access to the school mail system satisfied this standard. The Court specifically rejected the argument that a distinction between an organization certified as the exclusive representative and one not so certified was intended to discourage one viewpoint and advance another.

> We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views.

74 L. Ed. 2d at 807. The Court also found that limitation of mail box access was "reasonable." This holding was based upon the PEA's participation, as exclusive representative, in an official status with respect to the operational structure of the school district. 74 L. Ed. 2d at 808-09. The PEA had a special need for access to the school mails, and the school district had a special interest in seeing that the need was fulfilled. Further, a substantial interest in labor-peace within the

schools was fulfilled by excluding rival unions from the use of school mails. *Id.* Finally, the Court noted that substantial alternative channels of communication were available to those teacher organizations that did not hold the status of exclusive representative. 74 L. Ed. 2d at 810.

In this case the MCCFA, as exclusive representative, has the same status held by the PEA in *Perry Education Association*, and therefore the exclusion of others from meet and confer is not intended to encourage one viewpoint and discourage another. Because the State Board must meet and confer with the MCCFA as the representative of the faculty regardless of what position or view it expresses, there is no effort to suppress expression based upon the speaker's view.

The limitation of access to meet and confer to the exclusive representative is also reasonable for the reasons expressed in *Perry Education Association*. The Court found the restricted use of mails by the PEA reasonable given the PEA's exclusive status. In the instant case, the reasonableness of the restriction is even more fundamental in that it pertains to the right and the need of the State Board to deal with an exclusive agent on meet and confer issues in the first place. This Court ruled in *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26 (1977), that the interest of the state in dealing only with an exclusive agent is more than "reasonable"—it is supported by "important governmental interests" that therefore justified compelling public employees to financially support the exclusive representative, despite an "impingement on associational freedom." Relying on its prior decisions in *Railway Employers' Dept. v. Hanson*, 351 U.S. 225 (1956) and *Machinists v. Street*, 367 U.S. 740 (1961), the Court stated:

> The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law.

> The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid.

431 U.S. at 224.

The same interests make the government's decision to meet and confer only with an exclusive representative a reasonable one.[17] The state has a right to structure and organize its consultations with employees. Indeed, even the lower court recognized that the state could require meet and confer to occur through *representatives.* (Juris. A. 22). It is eminently reasonable for the state to rely on an exclusive representative to formulate and express the views of the employees it represents. This is particularly true given the ongoing relationship between employer and exclusive representative on bargainable issues. The dividing line between bargainable and non-bargainable issues is not always clear; in many cases—such as budget retrenchment—elements of both will be present. The potential for disruption of labor peace is obvious if the employer is confronted with possibly inconsistent or conflicting demands of separate meet and negotiate, and meet and confer representatives.

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[17] The lower court specifically upheld PELRA's meet and negotiate structure, but ruled that there is less of a governmental interest in limiting access to meet and confer than in limiting access to meet and negotiate. (Juris. A. 25). As is subsequently argued, the lower court's conclusion is erroneous in this regard. *See* discussion, ***post,*** at pp. 35-41. It is sufficient to note here that even if the government interests are not considered "important," they are certainly "reasonable" under the standard articulated in *Perry Education*

The reasonableness of PELRA's meet and confer structure is also apparent because instructors have ample alternative means to express their views. As noted earlier, instructors may and do communicate informally with System administrators, and participate in other forums made available to all faculty.

Under *Perry Education Association*, therefore, even if the meet and confer process is characterized as a non-public forum, the state may permissibly limit participation to those persons designated by the MCCFA. *See also City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 177-178 (1976) (concurring opinion of Brennan, J., joined by Marshall, J.) (". . . the First Amendment plainly does not forbid [the state] from limiting attendance at a collective bargaining session to school board and union bargaining representatives and denying [individual employees] the right to attend and speak at the session"). Such a restriction is reasonable under the First Amendment and is not an effort to suppress expression because of its content.

C. The Lower Court Incorrectly Perceived This Case As Involving Issues Of Academic Freedom.

The lower court's conclusion that First Amendment interests were implicated in the conduct of meet and confer sessions was heavily influenced by its belief that issues of academic freedom in higher education were involved. It referred to issues considered in meet and confer as having "a special character as a matter of tradition, public policy and constitutional law." (Juris. A. 49). The lower court then relied upon

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Association. Because this case involves, at best, access to a non-public forum, rather than the compelled financial support at issue in *Abood*, the "reasonableness" standard established by *Perry Education Association* is the proper test to be applied here.

this Court's decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *Shelton v. Tucker*, 364 U.S. 479 (1960) and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) to conclude that the "vital concern for academic freedom warrants a heightened standard of scrutiny when, as here, the state regulates the forum for academic speech." (Juris. A. 21). Further, the court expressly limited its decision to the area of higher education, despite the fact that all professional public employees in Minnesota have the right to meet and confer. (Juris. A. 23 n. 19, 28 n. 21). The court's rationale relies on an erroneous assumption concerning faculty governance traditions, is incorrect as a matter of constitutional law, and has the effect of inhibiting the interests it professes to advance.

The precedent cited by the lower court recognizes the educational setting as an area of specific application of First Amendment principles. These principles, however, are not offended by PELRA's meet and confer structure because the meet and confer process does not impinge upon the educational activities historically entrusted to individual faculty members. The lower court's findings of fact include the following:

> Certain rights that might be characterized as elements of academic freedom are expressly protected by the employment contract [negotiated by the State Board and the MCCFA] *e.g.*, the right of faculty members to select their course materials and textbooks, to choose their methods of teaching, to research and publish their work, to evaluate student performance and to select library materials.

(Juris. A. 52). Meet and confer plainly does not involve such issues as compulsory loyalty oaths (as in *Keyishian*), intru-

sion by the state into the content of a professor's lectures (as in *Sweezy*), or compulsory divulgence by teachers of membership in associations (as in *Shelton*). The lower court acknowledges that such cases are not controlling here. (Juris. A. 21). The lower court offers the opinion, however, that the tradition of faculty governance is an issue of similar constitutional magnitude.

The court's view that the meet and confer process "codifies a long-standing tradition of participation in college governance" represents a misconstruction of the record and the realities of life in the Minnesota community colleges. The "meet and confer" process gave to these community college instructors a right which they had previously not enjoyed: the right to insist that the administration listen and respond to faculty views concerning non-bargainable issues as presented by a faculty representative. The record clearly establishes that prior to the passage of PELRA, instructors at the community colleges could participate in dialogue concerning campus issues only to the extent permitted by various college administrators. At some campuses, faculty participation was minimal to non-existent; at all campuses individual college presidents and administrators unilaterally determined the extent of faculty input.[18] It is unfair and unrealistic to assume that faculty governance traditions perhaps existing in a few elite, long-established colleges and universities also existed in this state-operated system of two-year community colleges. As one commentator has observed:

> We hear much weeping about the loss of shared governance on American campuses. In some respects, the weeping concerns a Magic Kingdom that never even existed; in other cases, the weeping has some real basis.

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[18] See discussion, *ante*, at p. 4.

> The ancient ritual of shared governance has rarely been practiced in modern times. Maybe it existed in the Middle Ages, or at Oxford, or at the Sorbonne; and maybe it still occurs at a few universities. But for most faculty and most institutions most of the time real shared governance is as mythical as a fable.
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> But in any event [the] Magic Kingdom [of shared faculty governance] is a small—no, tiny—part of the forest. In the rest of the forest, the people rarely worship shared governance. Community colleges are usually dominated by rigid bureaucracies and heavy-duty administrators. Most state colleges, born from teacher's colleges, do not even have pretentions about faculty involvement in decisions. And with a few exceptions, the liberal arts colleges are fiefdoms of presidents who, with the acquiescence of docile trustees, may call the shots, hire and fire the faculty, and decide what color the new dorm curtains will be.

J. Baldridge, *Shared Governance: A Fable About the Lost Magic Kingdom*, 68 *Academe* 12, 13 (1982).[19] The establishment of a legislatively mandated meet and confer process in Minnesota was a victory for community college instructors desiring to effectively consult with the administration on non-

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[19] This Court has recognized that the faculty governance traditions of "mature" universities do not necessarily exist in other institutions of higher learning. *NLRB v. Yeshiva University*, 444 U.S. 672, 690 n. 31 (1980). Nowhere is this more likely to be true than in state-created, two-year community college systems. Begin, Settle and Alexander, *The Emergence of Faculty Bargaining*, published in *Campus Employment Relations*, 139 (Tice, ed. 1976); K. Mortiner and T. McConnell, *Sharing Authority Effectively* 54-55 (1978). With respect to such institutions, the observations of Mr. Justice Brennan, dissenting in *Yeshiva*, seem particularly appropriate: ". . . the university of today bears little resemblance to the 'community of scholars' of yesteryear". 444 U.S. at 702.

bargainable issues. It was not a codification of a pre-existing practice. To the extent the lower court's invocation of academic freedom relies on such an assumption, its rationale is incorrect and must be rejected.

The lower court acknoweldged that there is no precedent for its reliance on academic freedom in support of individual instructors' rights to participate in meet and confer—*i.e.*, to require the State Board to listen to their views and respond. (Juris. A. 21 n. 16). In fact, faculty members at institutions of higher learning have in the past attempted unsuccessfully to assert a constitutional right to participate in collegiate decision-making. In *Johnson v. Board of Regents*, 377 F. Supp. 227, 238 (W.D. Wisc. 1974), the court rejected the argument that the faculty of a state university system had a constitutional right to participate in the decision-making process resulting in termination or layoff of faculty members, including the selection of faculty members to be affected, based on enrollment or fiscal considerations. Similarly in *Gonzales v. Irizarry*, 387 F. Supp. 942 (D.P.R. 1974), the court rejected a constitutional attack by members of a public university faculty concerning the rules established to govern election to a faculty senate. The rules allowed certain faculty members to serve on the faculty senate for more than two consecutive terms while barring other faculty members from being elected to more than two consecutive terms. The court rejected the plaintiffs' attack based on free association, free expression and equal protection grounds stating it would not equate voting for members of the academic senate with the right of political freedom and association. 387 F. Supp. at 946.[20]

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[20] *See also Peacock v. Board of Regents*, 380 F. Supp. 1081, 1085 (D. Ariz. 1974) (holding that democratic principles while defensible as a matter of policy, are not constitutionally required in institutions of higher learning).

From these cases it is clear that the lower court's decision is not only premised on unsupported assumptions concerning the tradition of faculty governance, it is contrary to precedent which holds that the Constitution does not dictate governance structure at institutions of higher education.

The lower court's order also has the ironic effect of undermining the interests it purports to support. It states that public policy supports participation by faculty in deciding issues within the scope of meet and confer—issues which it describes as having a "special character as a matter of tradition, public policy and constitutional law." (Juris. A. 20). The meet and confer process established by PELRA is a part of an overall framework for establishing balanced public employee labor relations central to which is the principle of exclusivity. As discussed earlier, the benefits of exclusivity to the government make it a reasonable structure for conferring with employees.[21] The benefits to the instructors are more patent. By focusing the full weight of employee desires through a single representative, employees can more effectively achieve their goals. The lower court's rejection of exclusivity in favor of independently elected meet and confer committees results in the potential for those committees to be internally divided and unable to present a uniform position. Such internal division decreases the impact that the faculty can have on the decisions which are subject to meet and confer.

This Court has recognized the fundamental proposition that employees' strength is increased through collectivization. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61-62 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-181 (1967). This fundamental

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[21] See discussion, *ante*, at pp. 23-25.

principle underlying collective bargaining is just as applicable to meet and confer subjects as it is to negotiated terms and conditions of employment. A primary factor causing faculty members to choose an exclusive representative is the ineffectiveness they have experienced in dealing with college administrations through less organized procedures. Feller and Finken, *Faculty Bargaining In Public Higher Education*, published in *Faculty Bargaining In Public Higher Education: A Report of the Carnegie Council on Policy Studies in Higher Education*, 131 (1977). Exclusive representation *enhances* faculty input, rather than detracting from it.

In summary, the lower court's decision cannot be supported by reference to principles of academic freedom. The decision assumes traditions of faculty governance which do not exist. It is incorrect as a matter of constitutional law. It also serves to weaken the impact of faculty participation in college decision-making which it purports to advance.

D. PELRA Provides A "Fair Opportunity To Participate" In The Selection Of The Meet And Confer Representative.

Even if the lower court's thesis is accepted that the First Amendment principles of free speech or free association require the state to provide Knight with a "fair opportunity to participate" in the selection of meet and confer committees, PELRA provides that "fair opportunity." PELRA establishes comprehensive procedures for the selection of the exclusive representative through a democratic process supervised by an independent state agency, the Bureau of Mediation Services. Minn. Stat. § 179.67 (1982). All faculty members, regardless of their affiliations, may participate in this process, just as they participated in the process of selecting the faculty senates

or councils (on those campuses where such bodies existed). The statute also provides that dissatisfied employees may petition for replacement or disestablishment of the exclusive representative. This procedure allows a "fair opportunity to participate in the selection of governance representatives" if the First Amendment be thought to impose such a requirement.[22]

Knight's complaint arises from the fact that the MCCFA, and not Knight and his colleagues (or any organization they are entitled to form), has been selected by the majority of the faculty to be their meet and confer representative. Because the selection of the exclusive representative has occurred on a democratic basis encompassing all faculty, the fact that non-MCCFA members have not, as a matter of practice, been selected by the MCCFA to express its position as members of meet and confer committees is of no constitutional significance. Certainly a faculty senate may choose its committees from among senate members, without being constitutionally required to appoint faculty members who were not elected to the body. For constitutional purposes, the MCCFA's selection of meet and confer committees is no different.

This argument was noted but not persuasively refuted by the lower court. (Juris. A. 27-28). Viewed in this light, the lower court is actually holding that the First Amendment prohibits the state from requiring the selection of a "meet and negotiate" representative and a "meet and confer" representative at the same time, on the same ballot. The court is ruling

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[22] The lower court asserts that PELRA provides no procedures for selecting a meet and confer representative. (Juris. A. 19 n. 14). This may be true where a unit of professional employees does not engage in meet and negotiate. Because the MCCFA is both a meet and negotiate, and meet and confer representative, however, it is required to submit to the elaborate election process described above.

that professional employees must have separate votes for the "meet and negotiate" and "meet and confer" representatives. Moreover, the lower court's subsequent ruling requiring cumulative voting in meet and confer elections appears to require that there be more than one meet and confer representative, contrary to PELRA's language.[23] Even assuming that the First Amendment establishes a "fair opportunity to participate" requirement in this context, there is no constitutional basis for the court's ruling that the state must conduct a two-tiered selection process for the two functions, or that several meet and confer representatives must be selected.

The existence under PELRA of a "fair opportunity to participate" in the democratic selection of the meet and confer representative also refutes the lower court's asserted infringement of Knight's free association rights. The lower court suggests that aside from infringement of free speech interests, the meet and confer process "also infringes the First Amendment associational rights of faculty members who desire not to join the MCCFA." (Juris. A. 24). This alleged infringement arises because the ability to serve on a meet and confer committee is "completely lost unless one joins the MCCFA." (Juris. A. 28). Further, the court asserts the "right [of non-member instructors] to speak out is further impaired by the knowledge that one could be excluded from serving in the process if the MCCFA should desire to retaliate for protected speech activity." (Juris. A. 24).

The court's reasoning is flawed because it forwards as a constitutional infringement what are the inevitable consequences of any democratic representational system. With respect to the lower court's assertion of potential retaliation,

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[23] See discussion, *post*, at p. 43.

it is important to note that the court found no evidence that such retaliation had occurred. (Juris. A. 52). More fundamentally, it is essential to any selection process that the views of the potential representative be taken into account. Certainly instructors voting in the separate meet and confer election envisioned by the lower court's decision would properly consider the views of those running in deciding for whom to vote. If not being voted for or selected as a representative because of one's views is termed "retaliation," then such "retaliation" is a fairly common occurrence. If desire to be selected inhibits a person from speaking his true mind, then such an inhibition can hardly be called unconstitutional. Such "retaliation" and "inhibition," if those labels be used, are inherent in any system for the democratic election of representatives. *Branti v. Finkel*, 445 U.S. 507, 533 (1980) (Powell, J., dissenting) ("[No candidate for elected public office may] contend seriously that the voters' decision not to re-elect him because of his political views is an impermissible infringement upon his right of free speech or affiliation.")

The same analysis disposes of the lower court's suggestion that instructors may feel compelled to join the MCCFA in order to participate in the meet and confer process. Non-MCCFA members are not compelled to join the MCCFA in order to participate in the meet and confer process insofar as they are entirely free to participate in the selection of the exclusive representative. The amount of influence which the minority may exert on the majority-selected representative—with regard to the positions taken by that representative, or the persons which the representative chooses to express its positions—may vary according to a number of factors, none of which rises to the level of a constitutionally cognizable compelled association. Republicans living in a district which has

historically sent only Democrats to Congress may feel in some sense "compelled" to join the Democratic Party in order to maximize their influence on issues of importance to them. No one would claim that such "compulsion" violates the First Amendment. Any "compulsion" experienced by a non-MCCFA member is of the same nature. Once it is agreed that a system of democratic representation is to be used,[24] those in the minority will always experience such pressure. The existence of such pressure does not render democratic representation unconstitutional.

In short, PELRA provides Knight with a "fair opportunity to participate" in the selection of a meet and confer representative. No unconstitutional infringement of associational rights occurs as a result of this democratic procedure.

E. Compelling Governmental Interests Support The Meet And Confer Structure Established By PELRA And Override Any Infringement Of First Amendment Interests.

The lower court ruled improperly, as argued above, that the meet and confer structure implemented by PELRA "infringes fundamental First Amendment guarantees." (Juris. A. 24). It further concluded that the meet and confer structure, as applied by the State Board and the MCCFA, was unsupported by "compelling, legitimate state interests which cannot be furthered by less intrusive means." (Juris. A. 27). The district court's conclusion should be rejected.

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[24] The lower court upheld the requirement of a democratic selection process, noting that a requirement that the State Board meet and confer upon the demand of any instructor could cause the result that "no meaningful faculty expression would emerge and that both faculty and administration would be deprived of the benefits from an orderly, systematic exchange of views." (Juris. A. 22).

PELRA persuasively states the interest which it seeks to achieve:

> The relationships between the public, the public employees, and their employer governing bodies imply degrees of responsibility to the people served, need of cooperation and employment protection which are different from employment in the private sector. So also the essentiality and public desire for some public services tend to create imbalances in relative bargaining power or the resolution with which either party to a disagreement presses its position, so that unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.
>
> Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties; adequate means must therefore be established for minimizing them and providing for their resolution. Within the foregoing limitations and considerations the legislature has determined that overall policy may best be accomplished by:
>
> (1) granting to public employees certain rights to organize and choose freely their representatives;
>
> (2) requiring public employers to meet and negotiate with public employees in an appropriate bargaining unit and providing for written agreements evidencing the result of such bargaining; and
>
> (3) establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer and the public at large.

Minn. Stat. § 179.61 (1982). Within this overall framework, PELRA establishes the meet and confer framework in order

"to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas." Minn. Stat. § 179.73 (1982). Given the important objective of obtaining input from professional employees within a framework which promotes labor peace, the reliance on the exclusive bargaining representative to be the meet and confer representative is supported by compelling government interests.

The importance of the exclusivity principle, and the rationale underlying it, have been discussed earlier.[25] Briefly summarized, exclusivity avoids confusion in the presentation of employee views, avoids subjecting the employer to conflicting demands and minimizes the development of rivalries within the bargaining unit which would disrupt labor peace and detract from the benefits of collectivization.[26] Without

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[25] See discussion of the "reasonableness" of PELRA's meet and confer structure, *ante*, at pp. 24-25.

[26] Among the stipulations entered into between Knight and the State Board are the following, which bear upon the state's interests in such matters:

3. The goal of "labor peace"* is as important in the relationship between a public employer and its employees as it is between a private employer and its employees.

4. A statutory system which permits employees in a unit to be represented by an exclusive representative results in the avoidance of confusion, conflicting demands, and dissension that would result from more than one representative claiming to represent all the employees in said employee unit.

5. The State of Minnesota has a legitimate interest in maintaining "labor peace" by entering into agreements with an exclusive representative for each employee unit, which agreements are not subject to direct challenge by rival employee organizations claiming to represent the same employees in each unit.

. . .

* [footnote] "Labor peace" as used in this stipulation and at all other places herein is defined as a stable relationship between employer and employees which is characterized by the absence of work stoppages, work slowdowns, or unresolved disputes, and by the efficient continuation of public business and services. (A. 38).

exclusivity, there is a problem of inconsistency not only within the meet and confer team, but also between the meet and confer and meet and negotiate team.

The lower court recognized that interests such as these were sufficiently compelling to uphold the exclusivity principle where negotiation of terms and conditions of employment are concerned, consistent with this Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209, 220-21, 224 (1977). The lower court found the interests less than compelling, however, when applied to meet and confer. The lower court's reasoning does not withstand scrutiny.

The court asserts that, unlike other professional employees, community college faculty members do not need the impact of being represented in meet and confer by an exclusive representative because of the tradition of shared decision-making in higher education. (Juris. A. 25). As argued above, the court's assumption that such a tradition existed is not persuasive with respect to the community colleges here at issue.[27] Moreover, the court impliedly agrees that the faculty governance opportunities available prior to PELRA were inadequate with respect to items now subject to meet and negotiate procedures. If pre-PELRA "shared decision making" was inadequate for "meet and negotiate" subjects, it was just as inadequate for "meet and confer" subjects.

The lower court also asserts that exclusivity is less needed because "intangible" issues are involved in meet and confer, as opposed to the "tangible fruits" of negotiations over terms and conditions of employment. (Juris. A. 25-26). The labeling of a matter as "intangible" does not make it unimportant. Decisions made as a result of the meet and confer process on such

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[27] See discussion, *ante*, at pp. 27-29.

matters as curriculum and overall budget will have substantial impact on the instructors in the bargaining unit. Curriculum decisions, for example, substantially affect the academic qualifications and number of instructors who will be on the faculty. The lower court concedes the importance of these issues by describing meet and confer as an "important academic forum" where the faculty "resolve virtually every issue outside the scope of mandatory bargaining." (Juris. A. 22). The resolution of these issues provides benefits to MCCFA members and non-members alike just as does the negotiation of terms and conditions of employment in meet and negotiate. A unified faculty voice forwarded by an exclusive representative is just as important where the "intangible" issues of meet and confer are concerned, as in the negotiation of employment conditions.

The lower court argues that the MCCFA's security as the meet and negotiate representative will not be threatened by an independent meet and confer team. This contention misses the point. The principle of exclusivity in meet and confer is supported by the compelling interests stated above regardless of any impact on the negotiations process. The contention is also wrong. There will be an inevitable interplay between the meet and negotiate, and meet and confer procedures. The history of the litigation of PELRA's scope of mandatory negotiation before the Minnesota Supreme Court teaches that the line between the two areas is not clear. For example, in *Minneapolis Federation of Teachers v. Minneapolis Special School District No. 1*, 258 N.W. 2d 802 (Minn. 1977), the Minnesota Supreme Court interpreted PELRA to require that a school district meet and negotiate concerning criteria and procedures for intra-district teacher transfers, but not the decision to transfer itself. According to the court, the transfer criteria and procedures "directly affect a teacher's welfare" and there-

fore were negotiable. 258 N.W. 2d at 805. In *Minneapolis Association of Administrators and Consultants v. Minneapolis Special School District No. 1*, 311 N.W. 2d 474 (Minn. 1981), however, the court (in a 5-4 decision) refused to require the school district to meet and negotiate alterations in supervisory employees' duties, assignments and salaries, despite a finding that the action had "substantial consequences for the employees involved." 311 N.W. 2d at 477. Most recently, the court ruled in *Ogilvie v. Independent School District No. 341*, 329 N.W. 2d 555 (Minn. 1983) that a school district must negotiate criteria for selecting teachers for transfer between school districts, but on the basis of a different standard—that such an issue was "not likely to hamper the school board's direction of educational objectives." Obviously, the determination under PELRA of which subjects are negotiable and which areas are not is fraught with difficulty and unpredictability.

Because of the uncertainty as to which procedure a matter should be submitted to, there is obvious potential for conflict between the meet and confer, and meet and negotiate teams. Such a conflict presents a clear threat to the bargaining representative's status. Further, in areas where elements of both mandatory and non-mandatory bargaining subjects are involved—*e.g.*, budget retrenchment or transfer—conflicting positions between the committees might well lead to further confusion or detriment to the faculty. The lower court is wrong, therefore, in its assertion that an independent meet and confer team would pose no threat to the security of the exclusive bargaining representative. For the same reasons, the lower court is incorrect in its assertion that the State Board would not be subjected to irreconcilable, conflicting demands. (Juris. A. 27). At best, the community college administration will face conflicting demands. At worst, the adminis-

tration will play one group off against the other in order to achieve its own ends. For these reasons, the rationale supporting exclusivity in the formal "meet and confer" process is just as compelling as in the "meet and negotiate" arena. If First Amendment interests are at all infringed by the PELRA meet and confer structure, compelling state interests justify such an infringement.

II. THE DISTRICT COURT'S SUPPLEMENTAL ORDER REQUIRING THAT CUMULATIVE VOTING BE USED IN MEET AND CONFER ELECTIONS IS WITHOUT CONSTITUTIONAL BASIS.

In its order of April 5, 1983, (A. 190), the lower court improperly ruled that a "fair opportunity to participate" in any separate meet and confer elections required the use of cumulative voting. This requirement is wholly unprecedented, and exceeds even the measures taken in the sensitive area of alleged racial discrimination in the election of candidates to public office.

The lower court's ruling depends on a factual finding which does not justify its extreme response. The lower court found:

> As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union endorsed slate, no non-MCCFA member can ever be elected.

(A. 191). To remedy this perceived deficiency, the court ordered a cumulative voting system under which each voter would have a number of votes equal to the number of committee members being chosen, with the right to concentrate or distribute the votes among the candidates as desired. This system, the court found, would "ensure" that non-union faculty members will be able to elect at least one representative as-

suming a minimum number of non-union faculty exist and that they concentrate their votes. In essence, the lower court ruled that the First Amendment requires a voting scheme which will result in proportional representation of members and non-members on meet and confer committees.

The lower court cites no precedent for the proposition that the First Amendment requires either cumulative voting or proportional representation, and there is none. In fact, there appear to be no reported cases in which such a proposition has been urged.

In cases where systems for the election of public officials have been challenged on the basis of the Equal Protection Clause of the Fourteenth Amendment, the notion that the Constitution requires proportional representation has been rejected. The Court has held that, while the Constitution confers a right to "participate in elections on an equal basis with other qualified voters," it does not entitle a group in the minority to elect candidates in proportion to its numbers. *Mobile v. Bolden*, 446 U.S. 55, 75-78 (1980) (plurality opinion). Even if this case were held to be analogous to those involving alleged discrimination in the voting for public officials, it is plain that the lower court erred in determining that meaningful participation in the meet and confer process necessitated that the minority group to which the plaintiffs belong be ensured of electing its own representative.

Of particular interest is the Court's decision in *Whitcomb v. Chavis*, 412 U.S. 755 (1973). In reversing the district court's ruling that the Constitution required the disestablishment of a multi-member legislative district in favor of several single-member districts for elections to the Indiana legislature, the Court criticized as "not easily contained" the lower court's underlying rationale of required representation of minority

interests. 403 U.S. at 156. In discussing the extreme consequences which might result, the Court stated:

> Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting . . .

Id. The Court rejected this approach, stating that it was "unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them." 403 U.S. at 160.

A cumulative voting requirement is particularly inappropriate where imposed in a context of collective bargaining. PELRA requires that there be a *single* meet and confer representative, and where a unit of professional employees have decided to collectively bargain that meet and confer representative is the exclusive bargaining representative. The lower court's order necessarily requires that there be a number of meet and confer representatives as a logical pre-condition for cumulative voting. The cumulative voting requirement therefore not only prevents employees from having an exclusive representative for both meet and negotiate, and meet and confer purposes, it also prevents employees from having a single meet and confer representative. The court's decision is analogous to a holding that the State of Minnesota may not have a single governor, but must have a panel of several governors to ensure minority representation. No such constitutional requirement exists. Certainly the interests in and benefits of exclusive representation in the area of labor relations, discussed at length above,[28] are grounds for rejecting such a proposition in this case.

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[28] See discussion, *ante*, at pp. 35-41.

The lower court's requirement of cumulative voting in meet and confer elections must be rejected. It is unsupported by constitutional precedent. And by ensuring that the exclusive representative of community college faculty members is no longer exclusive, it defeats important state interests.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING APPELLEES TWENTY PERCENT OF THEIR COSTS.

Under Rule 54(d) of the Federal Rules of Civil Procedure, the allowance of costs is largely left up to the discretion of the trial court. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 232 (1964). That discretion, however, is to be exercised in accordance with recognized equitable principles, and the court's award will be set aside if an abuse of discretion is established. *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950). The lower court committed such an abuse of discretion in this case because its order that twenty percent of plaintiffs' costs be assessed against the State Board and the MCCFA is unrelated to the proportion of the proceedings below attributable to the issue on which Knight succeeded, and results in the MCCFA and State Board being required to subsidize conduct by Knight and his counsel which unreasonably and unnecessarily bloated this litigation.

The "meet and confer issue" was a very small portion of a major assault by Knight on the constitutionality of PELRA and the right of the MCCFA and the other appellant labor organizations to constitutionally function within PELRA's framework. Knight expended enormous time and energy in attempting to prove that the appellant labor organizations are

an "integrated" organization which is the constitutional equivalent of a "political party" and is engaged in a collective bargaining process which amounts to "fascism". (Juris. A. 4-5). This effort included a large amount of discovery directed towards these issues, and a substantial appellate practice in challenging lower court discovery orders, challenges routinely rejected as without foundation. *See Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *In re: Knight*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) *cert. denied* 449 U.S. 823 (1980).

In denying appellants' motion for an amended judgment on the costs issue, the district court stated:

> Defendants' motion to reduce the proportion of costs taxed against them is grounded on their contention that no more than 5-6 percent of the plaintiffs' efforts were expended on the "meet and confer" issue, the one issue on which plaintiffs prevailed. Plaintiffs have not disputed that the "meet and confer" issue was largely a discrete question of law and fact. Nor have they challenged defendants' assertions that the "meet and confer" issue was addressed in only 3 percent of plaintiffs' exhibits, 6 percent of the trial transcripts, .004 percent of plaintiffs' proposed stipulations and by none of plaintiffs expert witnesses.

(Juris. A. 2). Despite this recognition of the small and discrete nature of the meet and confer issue, the court adhered to its twenty percent cost award. As rationale it offered an observation, inconsistent with the statement quoted above, that there is "overlap between the First Amendment claim as to meet and confer practices and other practices challenged by plaintiffs." *Id.*

The lower court was correct in its initial assertion that the meet and confer issue was a "largely discrete question of law and fact." The only overlap between the two sets of claims was that both purported to invoke the First Amendment of the Constitution. Beyond that, the meet and confer issue had nothing in common with Knight's other claims.

The lower court was justified in its decision to apportion costs, based on the limited nature of Knight's success in this case. Ample precedent upholds apportionment in such circumstances. *See, e.g., Scientific Holding Co. v. Plessey, Inc.*, 510 F. 2d 15, 28-29 (2d Cir. 1974); *K-S-H Plastics, Inc. v. Carolite, Inc.*, 408 F. 2d 54, 60 (9th Cir. 1969); *Commonwealth of Pennsylvania v. Local Union 542, I.U.O.E.*, 507 F. Supp. 1146, 1152-54 (E.D. Pa. 1980); *Steel Construction Co. v. Louisiana Highway Comm'n*, 60 F. Supp. 183, 192-93 (E.D. La. 1945). The specific apportionment which was made, however, constituted an abuse of discretion because it bears no rational relationship to the degree of Knight's success; in no way did the "meet and confer issue" amount to twenty percent of this case. This is clear from the uncontroverted analysis of the proceedings presented to the trial court by the appellant labor organizations pertaining to trial transcripts, exhibits, stipulations and expert testimony.

Not only does the lower court's apportionment of costs lack a rational relationship to Knight's limited success, it also has the effect of requiring the MCCFA and the State Board to subsidize conduct by Knight and his counsel which caused this case to be unreasonably protracted. Where such conduct exists, any apportionment of costs should protect the opposing party from being forced to provide such a subsidy. In *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied* 338 U.S. 948 (1950), the court stated the

denial of costs or assessment of partial costs to a prevailing party should be made under circumstances like these.

> As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record . . .

176 F. 2d at 11. *See, also, ADM Corp. v. Speedmaster Packaging Corp.*, 525 F. 2d 662, 665 (3d Cir. 1975) (trial court has the authority to deny costs when prevailing party unduly extended and complicated resolution of issues); *Jones v. Schellenberger*, 225 F. 2d 784, 794 (7th Cir. 1955), *cert. denied* 350 U.S. 989 (1956) (court denied victor costs because of reprehensible conduct prolonging and greatly increasing costs of suit).

The lower court severely criticized Knight and his counsel for the manner in which this litigation was conducted:

> Much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding [of *Abood v. Detroit Board of Education, supra.*]

(Juris. A. 5 n. 2). The court further described appellees' theories as "frivolous" ones which could have been presented without the need for a trial of facts.

> Instead, the development of this theory was muddled with plaintiffs' theory that MCCFA, and probably any public sector union, is the constitutional equivalent of a political party, and was further blurred with repeated incantations that the arrangement under PELRA is the functional equivalent of Italian fascism and the National Industrial Recovery Act. *Indeed, the presentation of plaintiffs' case*

has hindered rather than helped the court to resolve the issues raised in their complaint.

(Juris. A. 4). (emphasis supplied).

Given the district court's recognition of the wasteful and unreasonable conduct of Knight and his counsel on the non "meet and confer" issues, the court's ruling requiring the appellants to financially support the costs of that conduct is an abuse of discretion.

CONCLUSION

Based on the foregoing, the appellant labor organizations respectfully request that paragraphs 1, 2 and 3 of the District Court's Order for Judgment, contained in its March 30, 1982, order, be reversed. Should the Court affirm with respect to the March 30, 1982, order, the appellant labor organizations request reversal of the portion of the District Court's order of April 5, 1983, which requires use of cumulative voting in meet and confer elections. Finally, should the Court affirm with respect to the March 30, 1982, order, the appellant labor organizations request reversal of that portion of the order which requires the MCCFA and State Board to pay Knight twenty percent of his costs.

Respectfully submitted,

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No. 82-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

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BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Is Minnesota's Public Employment Labor Relations Act unconstitutional because it grants Appellant Minnesota Community College Faculty Association a monopolistic privilege to "meet and confer" with Appellant Minnesota State Board for Community Colleges, on the basis of the former's status as exclusive representative for Appellees in the State's community colleges, even though: (i) this Court held exclusive representation itself unconstitutional in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), and *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936), and has never overruled or limited those decisions; and (ii) this Court has repeatedly invalidated legislative schemes designed to deny citizens equality of legal opportunity to participate in the political process?

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Appellees.

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BRIEF FOR THE APPELLEES

Appellees Leon W. Knight, *et alia,* hereby submit their brief on the merits, urging affirmance of the District Court's decision in No. 82-977.

STATEMENT OF THE FACTS

Knight and other faculty-members in the Minnesota community colleges sued to challenge the constitutionality of public-sector collective bargaining through exclusive representation under Minnesota's

Public Employment Labor Relations Act (PELRA).[1] After the Court of Appeals for the Eighth Circuit ruled that Knight raised substantial constitutional questions,[2] the parties entered into extensive stipulations of fact, and presented evidence in hearings on two issues relevant to this appeal: (i) whether the "meet-and-negotiate" provisions of PELRA[3] delegate governmental sovereignty to Appellant Minnesota Community College Faculty Association (MCCFA), and thereby abridge popular sovereignty for its benefit; and (ii) whether the "meet-and-confer" provisions of the act[4] discriminatorily deny academic freedom to Knight and other non-members of MCCFA by precluding them from conferring with their employer, Appellant Minnesota State Board for Community Colleges (Board), on matters of public concern relating to the performance of their duties as instructors.

At trial, Appellants conceded that PELRA requires the Board to negotiate and confer with MCCFA, a private organization, over college policies; that MCCFA is the only organization that can enforce this requirement; that through these imposed negotiations and conferences MCCFA attempts as much as possible to influence college policies; and that MCCFA considers itself and the Board "equal part-

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[1] Minn. Stat. §§ 179.61 *et seq.*

[2] Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976).

[3] Minn. Stat. §§ 179.63, subds. 16, 18; 179.65, subd. 4; 179.66, subds. 1-2, 7; 179.68, subds. 2(5), 3(3); 179.70; 179.74; 179.741, subd. 1(10).

[4] Minn. Stat. §§ 179.63, subd. 15; 179.65, subds. 1, 3; 179.66, subds. 3, 7.

ners in [the] process [of setting terms and conditions of employment]".[5] The parties then developed the significance of these facts through expert testimony.

I. The parties' expert witnesses testified without contradiction that collective bargaining and exclusive representation under Minnesota's Public Employment Labor Relations Act are equivalent to the systems of collective bargaining and exclusive representation involved in the statutes this Court struck down in *Schechter* and *Carter*.

The expert witnesses in labor and industrial relations (Professor Milton Derber, for the Board) and in political economy (Professor Melvyn Krauss and Dr. Philip Bradley, for Knight and the other faculty-members) all agreed that collective bargaining and exclusive representation under PELRA are evolutionally derivative of, functionally equivalent to, and structurally identical with the systems extant under the National Industrial Recovery Act (NIRA) and the Bituminous Coal Conservation Act (BCCA),[6] which this Court held unconstitutional in *A.L.A. Schechter Poultry Corp.* v. *United States*[7] and *Carter* v. *Carter Coal Co.*[8]

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[5] Defendant State Officials' Stipulations, Set I, Nos. 16-20; Transcript of Hearings Before Special Master Leonard K. Lindquist (T.) at 218-19, 466-71, 473-78, 774-78, 5338-46, 5381-82. *See* Plaintiffs' Revised Stipulations Nos. 1667-72; T. at 2140, 2579-85.

[6] Respectively, Act of 16 June 1933, ch. 90, 48 Stat. 195, *and* Act of 30 August 1935, ch. 824, 49 Stat. 991.

[7] 295 U.S. 495 (1935).

[8] 298 U.S. 238 (1936).

Professor Derber testified that the concepts of collective bargaining and exclusive representation under PELRA trace historically to, and are evolutionary developments of, those concepts as first embodied in NIRA and BCCA. Specifically, after explaining that NIRA "was the basis for * * * the arrangements that were developed under" BCCA, he testified as follows:

> Q. * * * [I]n your studies and research in this area have you found any legislation subsequent to [BCCA] and [NIRA] * * * which embodied * * * these same principles * * * that the [Supreme] Court dealt with in the Schechter and Carter cases? Were there any other laws after that that were of the same nature?
>
> A. * * * [O]n the labor side * * * all of these ideas were embodied in subsequent legislation. * * * [A]s far as [NIRA] section 7(a) [which provided for exclusive representation] was concerned, this * * * has been incorporated in all of these public-sector laws [such as PELRA] * * *.
>
> Q. Was there any significant difference between Section 7 of the NIRA and subsequent legislation dealing with labor relations * * * in your opinion?
>
> A. Not basically.

Then, asked whether "the function of collective bargaining that's going on in PELRA is essentially the * * * same functional operation as was going on in" NIRA and BCCA, Derber answered: "they were both designed to provide a framework in which collective bargaining could take place". On these points, Dr. Bradley concurred completely.[9]

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[9] T. at 5199, 5177, 5181-82, 5195-99, 5291; 5630-31.

Professor Krauss equated NIRA, BCCA, and PELRA as three statutory systems that conform analytically to the "corporative-state" (or "corporate-state") model of political economy, the key structural element in each being exclusive representation. In the private sector, Krauss testified, corporative-state arrangements "entai[l] the collectivization of employees * * * [and] employers by exclusive representation, * * * negotiations * * * [and] agreement between these groups as to the proper values of the key economic variables such as wages, and then submission of this agreement to government to approve or disapprove". In the public sector, such arrangements involve "the collectivization of employees by exclusive representation and the negotiation and agreement to ke[y] economic variables between the collectivized employees' group and the government". But, in both sectors, the same principles of political-economic analysis apply. In all of these judgments, Dr. Bradley concurred without reservation.[10]

In the public sector, Krauss explained, corporative-state institutions operate through compulsory collective bargaining between government as the employer and private groups of "collectivized employees". Through collective bargaining, "the government is * * * coerced to deal with these private groups". In this bargaining-structure, exclusive representation is "an essential,

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[10] *Id.* at 1342 (BCCA structurally equivalent to PELRA), 1352-53 (BCCA structurally equivalent to NIRA), 1353-54 (NIRA structurally equivalent to PELRA), 1341-42 (BCCA fits corporative-state model), 1353 (NIRA fits corporative-state model), 1324-28 (PELRA fits corporative-state model), 1343, 1401-02, 1311-12, 1285; 5616-28, 5633. *See id.* at 5231-33 (testimony of Professor Derber, defining basic corporative-state institutions).

critical element"—"the indispensable mechanism by which employees are collectivized". Noting that "[t]he representative is the sole spokesman for all members of the collectivized group, regardless of whether those members share the policies of the spokesman or do not", Krauss defined the purpose of exclusive representation as being

> to impose conformity of opinion among the members of the collectivized group with respect to the economic variables with which the group is concerned * * * [in order] to create a monopoly of political influence. This monopoly of political influence for exclusive representatives is the essence of the corporate state. * * * To have monopoly of political influence you need unanimity of action. To have unanimity of action you need conformity of opinion. To have conformity of opinion you need exclusive representation.

Specifically under PELRA, Krauss found corporative-state analysis applicable because: (i) MCCFA is a private organization, not a governmental agency; (ii) MCCFA represents all community-college faculty, whether or not they are its members; and (iii) MCCFA engages in compulsory collective bargaining with the Board pursuant to the statute's "meet-and-negotiate" and "meet-and-confer" provisions.[11]

This expert testimony establishes as a matter of political-economic fact that PELRA's exclusive-representation provisions fall squarely within the ambit of *Schechter* and *Carter*.

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[11] *Id.* at 1339-40, 1350-51, 1493-94, 1313, 1305, 1308, 1318-19, 1404, 1406, 1306-08, 1325-33, 1453-54, 1489-92, 1494.

II. The parties' expert witnesses testified without contradiction that collective bargaining and exclusive representation under Minnesota's Public Employment Labor Relations Act undermine governmental and popular sovereignty.

The expert witnesses in labor and industrial relations (Professor Milton Derber, for the Board), political economy (Dr. Philip Bradley, for Knight and the other faculty-members), political science (Professor Gordon Tullock, for Knight), and political theory (Professor Sylvester Petro, for Knight), all agreed regarding the effects of PELRA on representative government. Professor Derber testified: (i) that compulsory public-sector collective bargaining provides private organizations of public employees with a special procedure for controlling or influencing public-policy decisionmaking in addition to those employees' participation in the normal political process of elections and lobbying; (ii) that this special procedure is not available to other interest-groups concerned with the particular public policies at issue; and (iii) that therefore collective bargaining affords public employees more opportunity to influence the determination of these policies than other citizens have. In this context, Derber described PELRA's requirement that the Board "meet and negotiate" and "meet and confer" with MCCFA over college policies as "a sharing of responsibility for [that] particular function". By authorizing collective bargaining, he explained, "[t]he legislature is in effect saying that in the management of our governmental system in this state and these agencies it is appropriate for [MCCFA] to have a certain [share] in the decision-making". Derber linked this sharing of authority with an historic reformula-

tion of the doctrine of sovereignty: "[T]here was an increasing conviction that the idea of absolute sovereignty * * * was no longer an acceptable idea, namely, that * * * State Legislator[s] did have the right and the power to delegate various of these responsibilities or to share them * * * with private groups".[12]

Dr. Bradley agreed that public-sector collective bargaining transfers some amount of authority from popularly elected or regularly appointed officials to private groups acting as exclusive representatives:

> What happens under PELRA * * * is that there is a very substantial shift in the locus of decision making from individuals * * * and public authorities * * * to private [collectivities]. Actually, under those circumstances you cannot have collective bargaining of the kind that you have in the private sector. The reason * * * is that the [collectivities] that are created, these organizational groups now exert a tremendous power, or possess a tremendous power to make decisions.

Bradley then expanded on a major difficulty in the shifting of decision-making power under compulsory public-sector collective bargaining:

> A. * * * [T]he difficulty * * * is, where do you cut this off? Once you get producer groups deciding how the public revenues are to be allocated, how do you cut it off? Where can you say "This is the final step in shifting the focus of decision making?" * * * I can readily imagine many other groups [besides public employees] that have a legitimate interest in the making of decisions of this kind.

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[12] *Id.* at 5254, 5256, 5265, 5243, 5242, 5167.

Q. As an economist you can see no particular rational criterion for determining which groups should or should not participate?

A. No, I see absolutely no rational basis for that, and frankly, the whole system, once you start on it becomes pretty much an organizational disaster and a decision-making disaster.[13]

Professor Tullock explained that statutes giving particular private interest-groups a means to exert disproportionate influence on the government through special schemes of representation or lobbying are inconsistent with the normal pattern of representative government in this country (popular sovereignty).[14]

And Professor Petro testified that:

> [w]ith respect to governmental sovereignty, compulsory public sector collective bargaining is an absolute contradiction in which * * * governmental sovereignty * * * cannot continue to exist. There is no way in which governmental sovereignty can survive the existence of an absolute duty to bargain with an agency to which the employees of the government owe allegiance.
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> * * * *
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> [C]ompulsory public sector bargaining guarantees a state of affairs that's incompatible with governmental and popular sovereignty mainly because it tends to divert * * * the loyalty of public employees away from the government and the public to the [exclusive] representative which these laws have taught them to believe is mainly the agency that's going to represent their interests.[15]

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[13] *Id.* at 5650, 5651-52.

[14] *Id.* at 3708-10.

[15] *Id.* at 1743-44, 1758.

This expert testimony establishes as a matter of political-economic fact that PELRA's compulsory collective-bargaining provisions fall squarely within the ambit of numerous decisions of this Court applying the fundamental constitutional principle of political equality.[16]

The District Court acknowledged all this testimony and Knight's contention that, "because MCCFA is a private organization, it holds an impermissible power under PELRA to make 'economic laws' and its function constitutes an impermissible delegation of state sovereignty". But it held that: (1) "Minnesota has not impermissibly delegated its sovereign power", because "[n]egotiated agreements with state employees and even arbitration awards must be 'submitted to the legislature to be accepted or rejected' "; (2) "the legislature's retained authority" is sufficient, because "[t]he continuing vitality of *Schechter* and *Carter* * * * is doubtful at best"; (3) this Court's decision in *Abood* v. *Detroit Board of Education*[17] "squarely upholds the

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[16] City of Phoenix v. Kolodziejski, 399 U.S. 204, 208-10 (1970); Evans v. Cornman, 398 U.S. 419, 422-26 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704-06 (1969); Kramer v. Union Free School Dist., 395 U.S. 621, 630-33 (1969); Kirkpatrick v. Priesler, 394 U.S. 526, 533 (1969); Williams v. Rhodes, 393 U.S. 23, 31-32 (1968); Harper v. Board of Elections, 383 U.S. 663, 666 (1966); Carrington v. Rash, 380 U.S. 89, 93-94 (1965); Davis v. Mann, 377 U.S. 678, 691-92 (1964); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736-37, 738 & n.31 (1964); Gray v. Saunders, 372 U.S. 368, 379-80 (1963).

For an analytical overview of these decisions, *see* E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980), at 50-59.

[17] 431 U.S. 209 (1977).

constitutionality of exclusive representation bargaining in the public sector"; and (4) MCCFA's ability to exercise extraordinary political influence under PELRA has "no constitutional significance". Relying on these rulings, the District Court declared that, with regard to exclusive representation, "PELRA as applied to the community colleges is * * * valid in all respects".[18]

The District Court then acknowledged that PELRA's meet-and-confer" process also functions "only through the exclusive representative". But it distinguished "meet and confer" from "meet and negotiate" on various grounds, ultimately holding that "the rationale which * * * supports [collective bargaining] generally does not justify the MCCFA's sole authority to select meet and confer representatives in the community colleges", and declaring that monopolistic "authority" unconstitutional "in the context of higher education".[19]

Knight appealed in No. 82-901 from the District Court's decision on "meet and negotiate"; and MCCFA and the Board separately appealed in Nos. 82-977 and 82-898 from that Court's decision on "meet and confer". This Court summarily affirmed the District Court's ruling on "meet and negotiate"—improvidently, as Knight demonstrates hereinafter. And it agreed to hear the appeals on "meet and confer". Responding to MCCFA's appeal in No. 82-977, Knight argues herein that PELRA's "meet-and-confer" system is unconstitutional because it extends a monopo-

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[18] Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges, *in* No. 82-898, at A-9 to A-13, A-14 n.8; A-31.

[19] *Id.* at A-17 to A-31.

listic privilege to MCCFA based solely upon MCCFA's statutory status as exclusive representative in the community colleges, a status that not only lacks rational, articulated support in any decision of this Court, but also flies in the face of this Court's decisions in *Schechter* and *Carter,* and in numerous cases applying the fundamental constitutional principle of political equality. Responding in a separate brief to the Board's appeal in No. 82-898, Knight will contend that the District Court's invalidation of the "meet-and-confer" provisions was correct regardless of the constitutionality *vel non* of the "meet-and-negotiate" scheme.

SUMMARY OF THE ARGUMENT

In *Schechter* and *Carter,* this Court declared exclusive representation unconstitutional. Since then, it has not overruled, qualified, or questioned the vitality of these opinions on the subject. In numerous other decisions, this Court has held that equality of legal opportunity to participate in the political process is a fundamental principle of constitutional government. And it has never overruled, qualified, or questioned the vitality of these opinions, either.

At trial in this case, the parties' expert witnesses in labor and industrial relations, political economy, political science, and political theory unanimously testified that PELRA's exclusive-representation provisions are equivalent to analogous provisions in the statutes this Court invalidated in *Schechter* and *Carter.* The witnesses also agreed that PELRA's exclusive-representation scheme provides MCCFA with more political influence than other citizens have over public-policy decisionmaking in the community colleges.

In the context of these facts, and under *Schechter, Carter,* and this Court's political-equality decisions, exclusive representation is unconstitutional, because it infringes governmental and popular sovereignty. As MCCFA's monopolistic privilege to "meet and confer" with the Board derives from MCCFA's status as exclusive representative in the colleges, PELRA's "meet-and-confer" scheme is unconstitutional, too.

Should this Court acquiesce by silence in the District Court's ruling that exclusive representation is constitutional notwithstanding *Schechter, Carter,* and the political-equality cases, it will encourage the legislative allies of private special-interest groups at both the state and national levels increasingly to delegate governmental power to such groups, restructuring the American economy and political process along the corporative-state lines of Italian fascism.

ARGUMENT

Under PELRA, although "[a] public employer is not required to meet and negotiate on matters of inherent managerial policy", public employees "who are professional employees" have the right, and public employers have the obligation, to "meet and confer" to discuss all "policies and matters" not included within the category "terms and conditions of employment".[20] The statute defines "meet and confer" as "the exchange of views and concerns between employers and their respective employees".[21] Thus, PELRA ex-

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[20] Minn. Stat. § 179.66, subd. 1; Minn. Stat. §§ 179.65, subd. 3; 179.66, subd. 3. *See* Minn. Stat. § 179.63, subd. 18.

[21] Minn. Stat. § 179.63, subd. 15.

tends to "professional employees", such as Knight, a broad privilege of access to their employers to discuss potentially every subject touching on their employment, excepting only those within the purview of PELRA's "meet-and-negotiate" provisions.[22] However, PELRA then restricts this access by declaring that "[t]he employer shall not * * * meet and confer with any employee * * * except through the exclusive representative".[23] Overall, therefore, PELRA creates two interrelated fora to which exclusive representatives have sole access, and through which they can control or influence the course of public-policy decision-making: (i) "meet and negotiate", covering "terms and conditions of employment"; and (ii) "meet and confer", covering everything else.

In *Perry Education Association* v. *Perry Local Educators' Association,* this Court sustained a school district's policy of granting an exclusive representative monopolistic access to teachers' mailboxes and the interschool mail system, on the ground that the representative had "assumed an official position in the operational structure of the * * * schools, and obtained a status that carried with it rights and obligations that no other labor organization could share".[24] *Perry,* however, neither held that the exclusive representative's "official position" and "status" themselves were constitutional, nor even referred to any previous decision of this Court so holding. Instead, it simply *assumed* the legitimacy of the representative's "status", and

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[22] Minn. Stat. § 179.63, subd. 10; Minn. Stat. § 179.63, subds. 16, 18.

[23] Minn. Stat. § 179.66, subd. 7.

[24] —— U.S. ——, —— n.9, 103 S. Ct. 948, 957 n.9 (1983).

blinked the impropriety of a governmental delegation of an "official position" to a self-interested private group.

Here, PELRA grants MCCFA monopolistic access to the "meet-and-confer" process as a consequence of MCCFA's "official position" and "status" as exclusive representative in the community colleges. For that reason, Knight and the other faculty-members agree that MCCFA's "status" is relevant to the constitutionality of "meet and confer". But they deny that that "status" supports the system's validity. Rather, "meet and confer" is unconstitutional *precisely because it rests on MCCFA's "official position" and "status" as exclusive representative.* For exclusive representation itself is unconstitutional in public employment—as the record in this case proves, and as every opinion of this Court on the subject holds.

I. In *Schechter* and *Carter*, this Court unequivocally condemned exclusive representation as an unconstitutional delegation of governmental power to private groups, and has neither explicitly overruled those decisions, nor articulated any rationale for sustaining exclusive representation in private or public employment.

After full consideration in *Schechter* and *Carter,* this Court held exclusive representation unconstitutional without dissenting voice. Since then, the Court has not overruled, qualified, or even questioned the continuing vitality of those opinions on the subject. Neither has it explicitly advanced any theory of constitutional law rationally capable of sustaining exclusive representation in private, and particularly in public, employment.

A. In *Schechter* and *Carter*, this Court denounced exclusive representation as "legislative delegation in its most obnoxious form", that is "utterly inconsistent" with the Constitution and "intolerable".

The National Industrial Recovery Act (NIRA) authorized private "trade or industrial associations or groups" to apply for presidential approval of "codes of fair competition for the trade or industry * * * represented by the * * * applicants", made these codes "the standards of fair competition for [each] such trade or industry" upon the President's approval, and imposed sanctions against violations thereof.[25] The statute also required "[e]very code of fair competition" to contain provisions for organization of unions and collective bargaining within the particular trade or industry, and gave "the standards established in [collective-bargaining] agreements * * * the same effect as a code of fair competition".[26] The sole substantive requirement on the private "associations or groups" privileged to act as exclusive representatives of their respective trades or industries was that they "impose no inequitable restrictions on * * * membership * * * and are truly representative of such trades or industries".[27]

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[25] Act of 16 June 1933, ch. 90, § 3(a, b, f), 48 Stat. 195, 196, 197. The President could also promulgate codes *sua sponte*. § 3(d), 48 Stat. at 196.

[26] § 7(a, b), 48 Stat. at 198-99.

[27] § 3(a), 48 Stat. at 196. *Compare* the so-called "duty of fair representation" that this Court later imposed on unions acting as exclusive representatives under the Railway Labor and National Labor Relations Acts. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

NIRA thus fit perfectly into the corporative-state form of economic-*cum*-political organization: (i) The national government recognized private groups, organized on the basis of exclusive representation, as the "spokesmen" for employers and employees in particular branches of production. And (ii) it empowered these groups to enact codes, through collective bargaining and otherwise, binding on all members of the industry after approval by executive officials.[28]

In *Schechter*, this Court unanimously declared NIRA an unconstitutional delegation of legislative power under the Due Process Clause of the Fifth Amendment to the United States Constitution. To the government's argument that the codes were valid because they "consist of rules of competition deemed fair for each industry by representative members of that industry * * * most vitally concerned and most familiar with its problems", the Court retorted:

> [W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for * * * their trades or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? * * * The answer is obvious. *Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.*[29]

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[28] *See* T. at 1289-92, 1311-12, 1321-23, 1343, 1348-51, 1353, 1401-02, 1493 (testimony of Professor Krauss); 5616-25, 5633 (testimony of Dr. Bradley).

[29] 295 U.S. at 537 (emphasis supplied).

Following the pattern of NIRA, the Bituminous Coal Conservation Act (BCCA) authorized the organization of private "district boards of coal producers" as exclusive representatives for their segments of the industry, empowered these boards to fix prices and regulate "the sale and distribution of coal by code members within the district[s]" subject to approval by a commission of the national government, and imposed sanctions on dissenters.[30] The act also mandated collective bargaining "between representatives of producers * * * and representatives of the majority of mine workers [in each district]" to fix terms and conditions of employment.[31]

Again, BCCA fit the corporative-state pattern in all particulars: (i) The national government sponsored specially privileged private groups acting as the "spokesmen" for various segments of the coal industry. (ii) It authorized these groups to promulgate generally applicable codes. And (iii) it based the entire scheme on systems of exclusive representation for employers and employees alike.[32]

In *Carter,* this Court declared BCCA an unconstitutional delegation of legislative power. Referring spe-

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[30] Act of 30 August 1935, ch. 824, §§ 3, 4, Pt. I(a), 4, Pt. II(a, b, e), 5(b, c), 49 Stat. 991, 993-98, 1002-03.

[31] § 4, Pt. III, 49 Stat. at 1001-02, *especially* Pt. III(g), 49 Stat. at 1002.

[32] *See* T. at 1311-12, 1321-22, 1339-40, 1341-43, 1352-53, 1401-02, 1493-94 (testimony of Professor Krauss); 5177, 5231-33, 5237-38 (testimony of Professor Derber); 5616-25, 5633 (testimony of Dr. Bradley).

cifically to the exclusive-representation labor-provisions of the statute, the Court said:

> The effect, in respect of wages and hours, is to subject the dissentient minority * * * of * * * miners * * * to the will of the * * * majority * * *.
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> The power conferred upon the majority is * * * the power to regulate the affairs of an unwilling minority. *This is legislative delegation in its most obnoxious form;* for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * * [*A*] *statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.*[33]

And, as Chief Justice Hughes added,

> [t]he [exclusive-representation] provision permits a group of * * * employees, according to their own views of expediency, to make rules as to hours and wages for other * * * employees who are not parties to the agreements. Such a provision, apart from the mere question of delegation of legislative power, is not in accord with the requirements of due process of law.[34]

Thus, *Schechter* and *Carter* held, *without dissenting voice,* that government may not constitutionally require private persons to submit even their merely economic affairs to the control of exclusive representatives selected from among other private persons in the

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[33] 298 U.S. at 311 (emphasis supplied).

[34] *Id.* at 318 (concurring opinion).

same industry or employment, notwithstanding that the highest public officials in the land supervise the selection and decisions of the representatives.[35] And the holdings in *Schechter* and *Carter* are as directly relevant to every form of governmentally imposed exclusive representation, and as intellectually valid and legally vital, today as when this Court enunciated them nearly half a century ago.[36]

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[35] NIRA empowered the President and his subordinates to approve, disapprove, or impose conditions on the approval of codes prepared by "trade or industrial associations or groups", or to prescribe such codes themselves. §§ 2(a, b), 3(a, d), 4(a), 7(b, c), 48 Stat. at 195-96, 196, 197, 199. *Schechter* made clear, however, that even Congress could not constitutionally authorize private parties to enact such codes as exclusive representatives. 295 U.S. at 537.

BCCA empowered administrative agencies of the national government to approve, disapprove, modify, or fix outright codes for the production and marketing of coal. §§ 2(a), 4, Pt. I(a), Pt. II(a-c), Pt. III(c-g), 49 Stat. 992, 994-95, 995-98, 1001-02. *Carter* did not consider this purported "safeguard" relevant, however.

Where, as in public employment, *political* as well as economic matters are involved, these decisions should have a peculiarly compelling force. *See* Abood, 431 U.S. at 227-30 (opinion of Stewart, J.), 243 (Rehnquist, J., concurring), 252-53, 256-59 (Powell, J., concurring in the judgment) (commenting on political nature of public-sector employment, unionism, and collective bargaining).

[36] The *Carter* Court premissed its holding on *Schechter*, and on the earlier decision in *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912). 298 U.S. at 311-12. Since then, these cases have received approbation in many opinions. *E.g.*, Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting) (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 6-7 (1974); National Cable

B. No opinion of this Court has overruled, qualified, or even questioned the continuing vitality of *Schechter* and *Carter* on the subject of exclusive representation; or advanced any theory of constitutional law rationally capable of upholding exclusive representation in private or public employment.

After *Schechter* and *Carter*, the unconstitutionality of exclusive representation in private employment escaped judicial review on three occasions. When the validity of the National Labor Relations Act [37] was first in issue, the Labor Board selected its test-cases "intentionally [to] avoi[d] presenting the Court with [this] 'touchy' and * * * doubtful questio[n]".[38] And in *NLRB* v. *Jones & Laughlin Steel Corp.*, this Court avoided the problem of *exclusive* representation by interpreting the statute to permit individual employees to bargain directly with their employer over the terms

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Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1973); New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 125-26 & n.30 (1978) (Stevens, J., dissenting); McGautha v. California, 402 U.S. 183, 252-54 & nn.2-3, 271-73 & nn.21-22 (1971) (Brennan, J., dissenting).

Schechter and *Carter* would not reach purely voluntary arrangements adopting exclusive representation that private employers and unions negotiated under common law, or pursuant to statutory authority merely codifying common-law principles.

[37] Act of 5 July 1935, ch. 372, 49 Stat. 449, *now* 29 U.S.C. §§ 151 *et seq.* (1976).

[38] J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* (1974), at 187.

and conditions of their employment.[39] Similarly, in a contemporaneous challenge to the Railway Labor Act [40] in *Virginian Railway* v. *System Federation No. 40,* the Court held that exclusive representation under that statute allowed individual contracts between the employer and its employees.[41] These holdings reflected the unanimous position of the litigants on the issue.[42] The later decision in *Steele* v. *Louisville & Nashville Railroad Co.* also pretermitted the question, by creating the "duty of fair representation"—precisely to avoid

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[39] 301 U.S. 1, 45 (1937) (act does not prevent "employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ").

[40] Act of 20 May 1926, ch. 347, 44 Stat. 577, *now* 45 U.S.C. §§ 151 *et seq.* (1976).

[41] 300 U.S. 515, 548-49 (1937).

[42] *See* Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937), at 13, 33-34, 40, 88-89, 118.

Only seven years later, in cases raising issues of statutory construction alone, did this Court purport to re-interpret the National Labor Relations and Railway Labor Acts to preclude individual contracts under some circumstances. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin Steel Corp.* and *Virginian Railway,* although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 745, 789-91 (1940).

grappling with serious problems of due process and equal protection that exclusive representation raised."[43]

In its first decision implicating exclusive representation in public employment, *City of Madison, Joint School District No. 8* v. *WERC*, this Court felt it unnecessary to define "the extent to which true contract negotiations between a public body and its employees may be regulated".[44] But it squarely held under the First and Fourteenth Amendments to the United States Constitution that "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who * * * might wish to express his views about governmental decisions concerning labor relations".[45]

This year, *Perry Education Association* v. *Perry Local Educators' Association* did sustain the authority of an exclusive representative of public-school teachers to secure for itself through collective bargaining monopolistic access to the schools' mail system. But *Perry* upheld such "exclusive access" as "a permissible labor practice in the public sector" on the basis, not of any constitutional analysis of exclusive representation itself, but of a decision of a state public-employment commission, and of a "federal employment" statute and various administrative decisions construing it. Moreover, the *Perry* majority also noted that "[e]xclusive access provisions in the private sector * * * have yet to be expressly approved". And the entire decision

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[43] 323 U.S. 192, 198 (1944). *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967). *See generally, e.g.*, Weyland, "Majority Rule in Collective Bargaining", 45 *Colum. L. Rev.* 556, 568-69 (1945).

[44] 429 U.S. 167, 175 (1976).

[45] Abood, 431 U.S. at 230 (opinion of Stewart, J.).

simply *assumed* that the exclusive representative's "official position in the operational structure of the * * * schools", and its "status", were legitimate.[46]

Most recently, this Court affirmed without briefs, argument, or opinion the District Court's decision in No. 82-901. That such summary treatment of the exclusive-representation issue lacks force as precedent, and will be questioned by every thinking person conversant with the history of this subject, requires no emphasis.

In sum, no opinion of this Court has articulated a single theory of constitutional law at odds with the holdings in *Schechter* and *Carter* that condemned exclusive representation as "legislative delegation in its most obnoxious form". Avoidance of the question in *Jones & Laughlin Steel Corp.* and other cases presents no argument against its existence. Assumption of the constitutionality of exclusive representation in *Perry* adduces no proof of its validity. And summary affirmance in No. 82-901 indicates only that the Court failed to realize its opportunity to deal with this issue in the context of a record that renders possible a definitive decision.

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[46] —— U.S. ——, —— n.9, —— n.11, 103 S. Ct. 948, 957 n.9, 958 n.11 (1983).

II. The record in this case establishes that exclusive representation under Minnesota's Public Employment Labor Relations Act abridges governmental and popular sovereignty, in violation of the explicit holdings of *Schechter* and *Carter*, and of the fundamental constitutional principle of political equality that this Court has applied in numerous decisions.

Generally speaking, compulsory public-sector collective bargaining through exclusive representation transfers some measure of decisionmaking authority over public policies from public officials to private groups, delegating governmental power—and thereby sovereignty—to those groups. On this point, agreement is unanimous among commentators,[47] and even among the Judges of the District Court and the Justices of this Court.[48] Moreover, by delegating governmental sover-

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[47] *E.g.*, C. Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156, 1156, 1157, 1160 (1974) ("[t]he introduction of collective bargaining • • • in the public sector • • • restructures the political process"); R. Summers, *Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique* (Inst. of Pub. Employment, N.Y. State School of Indus. and Lab. Rel'ns, Monograph No. 7, Nov. 1976), at 3 ("[c]ollective bargaining cannot be engrafted on to [the governmental process] without redistributing power"); Wellington & Winter, "The Limits of Collective Bargaining in Public Employment", 78 *Yale L.J.* 1107, 1109 (1969) ("a great deal of shared control is implicit in any scheme of collective bargaining").

[48] Both the District Court, and this Court in *Abood*, commented that bargaining provides employees with "economic benefits" that justify imposing "agency fees" on nonmembers of the exclusive representative. Appendix, *ante* note 18, at A-11 to A-12; 431 U.S. at 221-22 (opinion of Stewart, J.). If collective bargaining *creates* benefits for some employees, though, it does so *only by altering the*

eignty to an exclusive representative, compulsory bargaining also abridges popular sovereignty for the representative's benefit. On this point, too, there is unanimity among commentators.[49] And the members

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course of public-employment policy from what it would have been absent bargaining, through the representative's ability to require the government to negotiate the substance of that policy. Now, a State's power to determine the wages, hours, and other working-conditions of its employees is "[o]ne undoubted attribute of state sovereignty". National League of Cities v. Usery, 426 U.S. 833, 845 (1976). Therefore, if *Abood* correctly sustained agency fees as payments for *special* benefits some employees receive from *and solely because of* bargaining, then (to the degree it confers such benefits) bargaining must involve a transfer of "state sovereignty" from the government to private groups. *Cf.* Abood, 431 U.S. at 243 (Rehnquist, J., concurring).

[49] *E.g.*, C. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 *Univ. L. Rev.* 669, 674-75 (1975) (public-sector bargaining "provide[s] a special process available only to public employees", and "significantly increases the political effectiveness of public employees in determining their terms and conditions of employment • • • relative to other competing political interest groups"); C. Summers, *ante* note 47, 83 *Yale L.J.* at 1193 (public employees "already have, as citizens, a voice in decisionmaking through customary political channels. The purpose of collective bargaining is to give them • • • a larger voice than the ordinary citizen"); R. Summers, "Public Sector Collective Bargaining Substantially Diminishes Democracy", *Gov't Union Rev.*, Vol. 1, No. 1 (Winter 1980), at 8, 21 ("[t]he redistribution of governmental authority pursuant to statutes establishing collective bargaining inherently diminishes democracy"; "bargaining • • • authenticates • • • a fundamentally non-democratic mode of decisionmaking—a form of interest group syndicalism"); Lieberman, "Teacher Bargaining: An Autopsy", *The Kappan* (December 1981), at 231, 232 ("[t]hat public sector bargaining in inconsistent with democratic government is no longer in doubt").

of this Court have not been unmindful of it, either.[50]

Furthermore, the detailed *and uncontradicted* testimony of the parties' expert witnesses fully documents the effects of PELRA in particular on governmental and popular sovereignty. The experts all agreed that collective bargaining and exclusive representation under PELRA constitute a delegation of legislative power equivalent to the delegations involved in NIRA and BCCA; that this delegation of legislative authority transfers some *quantum* of governmental sovereignty from the State of Minnesota to MCCFA; and that this transfer of governmental sovereignty circumvents or supersedes popular sovereignty with respect to the formulation of public policy in the community colleges.[51]

The record thus unavoidably presents one of the most serious political-economic issues of the twentieth century: namely, *the extent to which the Constitution allows self-interested private groups to exercise legislative power over this country's economic and political processes, outside of the traditional channels of representative government.*

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[50] Abood, 431 U.S. at 229 (opinion of Stewart, J.) ("permitting • • • a union to bargain as [public employees'] exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees • • • in the private sector"), 261 n.15 (Powell, J., concurring in the judgment) (because of delegation of power to exclusive representatives, "voters • • • could complain with force and reason that their voting power and influence on the decisionmaking process ha[ve] been unconstitutionally diluted").

[51] *Ante*, pp. 3-10.

III. This Court's acquiescence in the District Court's decision sustaining exclusive representation in public employment will encourage the state and national legislatures to license private special-interest groups to dominate every aspect of this country's private economy and political process.

Summary affirmance is not a proper disposition of the truly momentous issue Knight and the other faculty-members raised in No. 82-901. Indeed, by adopting this procedure, this Court abdicates its jurisdiction and abjures its responsibility to decide basic questions of constitutional law, instead licensing three judges of an inferior court cavalierly to expunge from constitutional jurisprudence *Schechter, Carter,* and this Court's political-equality decisions, and insouciantly to rationalize whatever corporative-state arrangements pliant legislators and self-interested private groups may conspire to impose on the American public from now on.

A. By acquiescing in the District Court's assertion that *Schechter* and *Carter* are inapplicable, lack "continuing vitality", or have been overruled *sub silentio*, this Court will encourage legislatures to delegate governmental sovereignty to private special-interest groups.

The District Court's incoherent opinion reflects the logical, legal, and factual impossibility of refuting the record in this case. Having conceded what it could not deny, that PELRA does delegate governmental sovereignty to MCCFA, the District Court simply pretended that this state of affairs raises no serious question of constitutional law, because: (i) the Minnesota Legis-

lature "retains authority" over the subject-matter of the delegation; (ii) *Schechter* and *Carter* lack "continuing vitality" as prohibitions of delegations of governmental power; and (iii) *Abood* overruled *Schechter* and *Carter sub silentio* insofar as exclusive representation in public employment is concerned. For this Court to credit these rationalizations entails abandonment of the non-delegation doctrine.

1. The District Court held PELRA's delegation of sovereignty to MCCFA "not impermissibl[e]", because "[n]egotiated agreements with state employees and even arbitration awards must be 'submitted to the legislature to be accepted or rejected' ".[13] Four errors vitiate this conclusion: *First,* it begs the question—which is *not* "What power has the legislature *retained?*", but rather "What power has it *delegated* to private groups?" Even if the Minnesota Legislature itself bargained with MCCFA, it would still have committed the State (through PELRA) *to negotiate the content of public policy in the colleges with a private group,* subject to compulsory arbitration of disputes and the threat of strikes.[14] Under PELRA, the Legislature enjoys no more "retained authority" than if it negotiated directly with MCCFA.[15] Unless the

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[13] Appendix, *ante* note 18, at A-10.

[14] *See* Minn. Stat. §§ 179.63 subd. 16; 179.64; 179.65-179.67; 179.68, subd. 2; 179.69-179.70; 179.74.

[15] The Legislature's sole power is to "accep[t] or rejec[t]", but not to modify or impose, "[t]he provisions of the negotiated agreements and arbitration awards". Minn. Stat. § 179.74, subd. 5. Indeed, the Legislature's own Commission on Employee Relations "may make recommendations [concerning collective bargaining] • • • *but no recommendation shall impose any obligation or grant*

"sharing" of governmental authority with a private group by a state legislature itself is always a "permissible" delegation of sovereign power, PELRA's arrangement is self-evidently unconstitutional.[55]

Second, the District Court's reliance on "retained authority" myopically focusses on the Legislature's remote, contingent, and limited review, while blinking MCCFA's direct, immediate, and plenary influence over adoption and implementation of college policies. This Court has repeatedly held that a legislature delegates no power by authorizing some party merely to approve, disapprove, suspend, or revive the operation of a statute—because the legislature determines the original substance of the law.[56] If a *granted* power to approve or disapprove the operation of a law involves no invalid *delegation,* such a *retained* power hardly constitutes a constitutionally significant *withholding* of legislative authority. Under PELRA, MCCFA and the Board jointly negotiate the agreements the Legislature must accept or reject. These agreements have "all the attributes of legislation for the subjects with

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any right or privilege to the parties". Minn. Stat. § 3.855, subd. 2 (emphasis supplied). Moreover, under some circumstances, the Commission may give "interim approval" to a "proposed agreement or arbitration award" that has been "rejected or • • • not approved by the legislature". Minn. Stat. § 179.74, subd. 5.

[55] *See* Schechter, 295 U.S. at 537 (congressional "delegation of legislative power [to private groups] is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress").

[56] *E.g.,* Currin v. Wallace, 306 U.S. 1, 15-16 (1939); Union Bridge Co. v. United States, 204 U.S. 364, 377-87 (1907); Field v. Clark, 143 U.S. 649, 681-83 (1892).

which [they] dea[l]".[57] The *real* lawmaking, then, derives from MCCFA's negotiations, not the Legislature's tardy approval thereof.

Third, the District Court's decision forgets that this Court long ago rejected the "retained-authority" defense. Under NIRA and BCCA, executive and administrative officials of the national government could approve, disapprove, modify, or establish themselves the codes the statutes licensed private groups to promulgate.[58] Nevertheless, *Schechter* and *Carter* condemned the delegations of legislative power to those groups as "utterly inconsistent" with the Constitution and "intolerable".[59]

Fourth and last, the District Court's ruling logically obliterates the non-delegation doctrine. For all *delegations*, as opposed to *abdications*, of legislative power implicitly assume the legislature's reservation of authority to revoke its grant, if only by repeal of the statute itself. An explicit statement of this "retained authority" adds nothing. Therefore, if mere "retained authority" immunizes *any* delegation of legislative power to private groups, then *all* such delegations—being rationally indistinguishable in this particular—are *always* constitutional.

For the District Court's decision to stand, then, this Court must join with it in expunging the non-delegation doctrine from constitutional law.

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[57] Abood, 431 U.S. at 252-53 (Powell, J., concurring in the judgment).

[58] NIRA §§ 2(a, b), 3(a, d), 4(a), 7(b, c), 48 Stat. at 195-96, 196, 197, 199; BCCA §§ 2(a), 4, Pt. I(a), Pt. II(a, c), Pt. III(c-g), 49 Stat. at 992, 995-95, 995-98, 1001-02.

[59] Schechter, 295 U.S. at 537; Carter, 298 U.S. at 311.

2. Sensing the absurdity of its "retained-authority" thesis in light of *Schechter* and *Carter,* the District Court disparaged their "continuing vitality" as "doubtful at best".[60] As recent opinions of this Court illustrate, the non-delegation doctrine of *Schechter* and *Carter* remains the law.[61] And the uncontradicted testimony of Professors Derber and Krauss, and Dr. Bradley, proves the materiality of that doctrine to the facts

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[60] Appendix, *ante* note 18, at A-10 to A-11.

[61] Industrial Union Dep't, AFL-CIO v. American Petrol. Inst., 448 U.S. 607, 646 (opinion of Stevens, J.), 664 n.1 (Powell, J., concurring in part and in the judgment) (1980); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340-42 (1973); United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in the result). *See also* cases in which Justices have asserted the nondelegation doctrine in circumstances where the majority saw no delegation problem. New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 125-26 (1978) (Stevens, J., dissenting); California Bankers Ass'n v. Schultz, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting); McGautha v. California, 402 U.S. 183, 252-54 & nn.2-3, 271-73 & n.21 (1971) (Brennan, J., dissenting); Zemel v. Rusk, 381 U.S. 1, 21-22 (1965) (Black, J., dissenting); Arizona v. California, 373 U.S. 546, 625-26 (1963) (Harlan, J., dissenting); United States v. Sharpnack, 355 U.S. 286, 297-98 (1958) (Douglas, J., dissenting).

Furthermore, two other decisions on which *Carter* relied, *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 121-22 (1928), and *Eubank* v. *City of Richmond,* 226 U.S. 137, 143 (1912), have also received continuing approbation. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting) (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 6-7 (1974); New Motor Vehicle Bd. of California, *ante,* 439 U.S. at 125-26 n.30 (Stevens, J., dissenting); McGautha, *ante,* 402 U.S. at 254 n.3, 272-73 & n.22 (Brennan, J., dissenting).

of this case.[42] For the District Court's decision to stand, then, this Court must join with it in eviscerating *Schechter* and *Carter,* with all the far-reaching political-economic consequences that action entails.

3. Attempting to avoid *Schechter* and *Carter* altogether, the District Court fantasized that "*Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector".[43] This is a five-fold misrepresentation: *First,* exclusive representation was not at issue in *Abood.* The complaints did not challenge it.[44] The lower courts did not rule on it.[45] The parties did not contest it before this Court,[46] but instead agreed that the "appeal * * * does not raise the question".[47] And the *Abood* plurality defined the problem as "whether [an agency-shop] arrangement violates * * * constitutional rights", holding that "[a]ll

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[42] The testimony of both Krauss and Derber rested in large measure on review of this Court's opinions in *Schechter* and *Carter.* T. at 1334-35, 5189-91.

[43] Appendix, *ante* note 18, at A-11.

[44] Appendix to Brief for Appellants, Abood v. Detroit Bd. of Educ., No. 75-1153 (U.S. Sup. Ct., filed 2 July 1976), at 6-15, 39-52. *See* 431 U.S. at 213 (opinion of Stewart, J.).

[45] Appendix to Brief for Appellants in *Abood,* at 94-104. *See* 431 U.S. at 215 (opinion of Stewart, J.).

[46] Jurisdictional Statement in *Abood* (filed 13 Feb. 1976), at 6; Brief for the Appellants in *Abood* (filed 9 July 1976); at 4; Brief for Appellees in *Abood* (filed 10 Sept. 1976), at x.

[47] Brief for the Appellants in *Abood,* at 148. "[T]he states are free to adopt * * * exclusive representation (*which appellants do not challenge*) * * *." Brief for Appellees in *Abood,* at 34 (emphasis supplied).

we decide is that * * * the complaint * * * establish[es] a cause of action" with respect to the agency shop.[68]

Second, no opinion in *Abood* addressed exclusive representation. The plurality invoked the representative's "various responsibilities" as rationalizing the agency shop—without referring to any decision sustaining the delegation of bargaining-privileges to a private organization in the public sector.[69] Justice Powell noted that a "collective bargaining agreement to which a public agency is a party * * * has all the attributes of legislation", and warned that "voters * * * could complain * * * that their voting power and influence on the [governmental] decision making process had been unconstitutionally diluted" by delegation to a private group of power to participate in making such economic laws—but he, too, refrained from any constitutional judgment.[70] Justices Rehnquist and Stevens said nothing on the subject. And the parties themselves reserved, or remained silent on, the delegation-question.[71]

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[68] 431 U.S. at 211, 236-37 (opinion of Stewart, J.). *Accord, id.* at 217, 224-25 (opinion of Stewart, J.).

[69] 431 U.S. at 224-25 (opinion of Stewart, J.). The plurality merely accepted as unchallenged the State's "determin[ation] that labor stability will be served by a system of exclusive representation". *Id.* at 229 (opinion of Stewart, J.).

[70] 431 U.S. at 252-53, 262 n.15 (opinion concurring in the judgment).

[71] Appellants in *Abood* noted the relevance of *Schechter, Carter,* and *Lathrop* v. *Donohue,* 367 U.S. 820 (1961), to the delegation-of-power problem. But they disclaimed any intent to "advert to the controlling nature of these decisions on the issue of exclusive representation", because "[i]t is not our purpose to raise the[se]

Third, the sole constitutional precedent subtending *Abood's* decision on the agency shop, *Railway Employes' Department* v. *Hanson,*[73] had nothing to do with exclusive representation. The *Abood* plurality cited *Hanson* only in connexion with the agency shop.[74] And the Court of Appeals heretofore in this case held *Hanson* irrelevant to exclusive representation.[75]

Fourth, the record in Abood lacked "factual concreteness and adversary presentation" even with respect to the agency shop.[76] Any "holding" regarding exclusive representation, then, could have amounted only to an advisory opinion, improper under Article III of the Constitution.[77]

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constitutional conundrums". Brief for the Appellants in *Abood,* at 126. Appellees' brief contained no reference to *Schechter* or *Carter* at all. *See* Brief for Appellees in *Abood,* at iv-viii.

Not surprisingly, then, the *Abood* plurality also ignored *Schechter* and *Carter,* and acknowledged *Lathrop* only to note that that decision "does not provide a clear holding to guide us in adjudicating the constitutional questions here presented". 431 U.S. at 233 n.29 (opinion of Stewart, J.). *Contrast* Lathrop, 367 U.S. at 853-55 (opinion of Harlan, J.), 878 n.1 (opinion of Douglas, J.) (discussing the relevance of *Schechter*). This silence would depart radically from traditional principles of constitutional adjudication if, as the District Court erroneously implied, *Abood* "overruled" *Schechter* and *Carter* on the delegation-issue.

[73] 351 U.S. 225 (1956).

[74] 431 U.S. at 215, 217 n.10, 222 (opinion of Stewart, J.).

[75] Knight v. Alsop, 535 F.2d 466, 470-71 (8th Cir. 1976).

[76] 431 U.S. at 236 (opinion of Stewart, J.). *Accord, id.* at 244 & n.* (Stevens, J., concurring).

[77] *See, e.g.,* United Pub. Workers v. Mitchell, 330 U.S. 75, 89-91 (1947).

Fifth and last, the *Abood* plurality itself compellingly distinguished the agency-shop issue there from that of exclusive representation here. Assuming the constitutionality of exclusive representation, appellants in *Abood* attacked only the requirement of financial support therefor. Because "[p]ublic employees are not basically different from private employees" with respect to unions, the plurality upheld the agency shop, relying on the private-sector case, *Hanson.*[11] Here, Knight and the other faculty-members challenge exclusive representation itself, because it delegates public authority to, and abridges popular sovereignty for the benefit of, a private group. Thus, unlike *Abood,* this case hinges on "[t]he very real differences between * * * bargaining in the public and private sectors", particularly that " '[t]he uniqueness of public employment * * * is in the special character of the employer' ", government."[12]

In sum, *Abood* is irrelevant because: the record there did not frame the exclusive-representation issue; the parties did not present, argue, or even contest the matter; resolution of the question was unnecessary for the Court's decision; and none of the opinions even described, let alone analyzed or solved, the legal problems present here.[13] For the District Court's decision

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[11] 431 U.S. at 230-31, 232 (opinion of Stewart, J.).

[12] *Id.* at 230 (opinion of Stewart, J.), *quoting* C. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 *Cinn. L. Rev.* 669, 670 (1975). For this reason, even if relevant, *Abood* would not control here. *See, e.g.,* Quong Wing v. Kirkendall, 223 U.S. 59, 63-64 (1912).

[13] *Compare and contrast* United States v. Mitchell, 271 U.S. 9, 14 (1926), *and* Webster v. Fall, 266 U.S. 507, 511 (1925) (previous

to stand, then, this Court must join with it in perverting *Abood* beyond recognition.

Of course, a summary affirmance does not necessarily signify that this Court agrees with every jot of the reasoning of the tribunal the judgment of which it sustains.[50] None the less, in light of the unequivocal record in this case, every informed observer will be justified in interpreting this Court's disposition of No. 82-901 as a concession by silence that the Court will countenance wholesale delegations of governmental sovereignty to private special-interest groups.

How well the American public sector will function after these self-interested groups have usurped whatever governmental sovereignty their political influence enables them to seize is not difficult to predict. As Professor Krauss and Dr. Bradley explained at trial, insinuation of corporative-state arrangements into public employment will increasingly misallocate resources, disrupt labor peace, and generate rationally insoluble political conflicts among mutually antagonistic interest-groups.[51] Presumably, this Court decries such results. Yet its summary disposition of No. 82-901 will encourage state and national legislators to create or expand corporative-state institutions the operations of which can bring about no other state of affairs.

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decision not precedent on "question not raised by counsel • • • merely because it existed in the record and might have been raised").

[50] *E.g.*, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979).

[51] T. at 1292-99, 1302-04, 1420-26, 1360, 1363-64, 1380-85, 1300, 1372-76, 1428 (testimony of Professor Krauss); 5653-55, 5633-40 (testimony of Dr. Bradley).

B. By acquiescing in the District Court's contention that the extraordinary political prerogatives of an exclusive representative in public employment have "no constitutional significance", this Court will embolden legislatures to undermine popular sovereignty for the benefit of private special-interest groups.

As noted above, by delegating governmental sovereignty to MCCFA, PELRA also abridges popular sovereignty for that private organization's benefit. In a mere footnote to its opinion, however, the District Court held that the unequal political influence MCCFA enjoys through its unique legal privilege to "meet and negotiate" concerning college employment-policies has "no constitutional significance".[82]

Exactly the opposite is true: Equally foreign to the Constitution are the notions that government may enhance the speech of one group in order to attenuate the relative voices of others, or distort its decision-making processes in order to benefit one group at everyone else's expense.[83] Indeed, even "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees".[84] Yet PELRA grants MCCFA a monopoly, not simply to express its views, but also to compel the Board to negotiate and confer over those views, and to enter

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[82] Appendix, *ante* note 18, at A-14 n.8.

[83] *See, e.g., mutatis mutandis,* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-92 (1978); Washington v. Seattle School Dist. No. 1, —— U.S. ——, ——, 102 S. Ct. 3187, 3193-95 (1982).

[84] City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 175-76 (1976) (footnote omitted).

into agreements that have "all the attributes of legislation for the subjects with which [they] dea[l]".[85]

The essence of compulsory bargaining under PELRA is MCCFA's monopolistic political control or influence over governmental decisionmaking in the colleges. This Court, however, has ruled repeatedly in other contexts that such political discrimination is unconstitutional, even if it promotes or defeats "good" or "bad" political views; balances political power among competing interest-groups; encourages "political stability"; solves "practical [political] problems"; aids or hinders particular economic, social, or other non-political interests; recognizes the "special pecuniary or other interest" of some group in a governmental decision; takes employment-status into account; or even satisfies the demands of majorities.[86] No rational—let alone legal, politically sound, or moral—basis exists for relaxing this precept of democratic government on behalf of a private, self-interested organization such as MCCFA.[87]

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[85] Abood, 431 U.S. at 252-53 (Powell, J., concurring in the judgment).

[86] Cipriano v. City of Houma, 395 U.S. 701, 704-06 (1969); Carrington v. Rash, 380 U.S. 89, 93-94 (1965); Davis v. Mann, 377 U.S. 678, 691-92 (1964); Gray v. Saunders, 372 U.S. 368, 379-80 (1963); Williams v. Rhodes, 393 U.S. 23, 31-32 (1968); Kirkpatrick v. Priesler, 394 U.S. 526, 533 (1969); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 736-37, 738 & n.31 (1964); City of Phoenix v. Kolodziejski, 399 U.S. 204, 208-10 (1970); Evans v. Cornman, 398 U.S. 419, 4[illegible]26 (1970); Kramer v. Union Free School Dist., 395 U.S. 621, 630-33 (1969); Harper v. Board of Elections, 383 U.S. 663, 666 (1966).

[87] *See, e.g.*, Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 273-74 (1936) (naked attempt to give "economic advantage" to

For the District Court's decision to stand, then, this Court must join with it in prostituting the political process in a way unknown in American history and violently at odds with the first principles of republicanism."

Indeed, summary affirmance in No. 82-901 rationally imports nothing less than that the doctrine of political equality has no place where legislatures agree to "negotiate" or "confer" about public policies with private special-interest groups to the exclusion of all other citizens. Perhaps this Court can explain why, after all, it is *not* true that, "[i]f power to determine school policy were shifted in part from officials elected by the population of the school district to officials elected by the school board's employees, the voters of the district could complain with force and reason that their voting power and influence on the decisionmaking process had been unconstitutionally diluted".[39] But, if such an explanation exists, someone should present it frankly to the American people.

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one private group is unconstitutional discrimination). Certainly, where political discrimination is involved, the District Court's "retained-authority" apology is meritless. *See* Washington v. Seattle School Dist. No. 1, —— U.S. ——, ——, 102 S. Ct. 3187, 3198-200 (1982); Crawford v. Board of Educ. of City of Los Angeles, —— U.S. ——, ——, 102 S. Ct. 3211, 3226 (1982) (Marshall, J., dissenting).

[38] *See The Federalist* No. 10, *applied to this issue in* E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980).

[39] Abood, 431 U.S. at 261 n.15 (Powell, Jr., concurring in the judgment).

C. The logical consequence of acquiescing in the District Court's decision sustaining exclusive representation is for this Court implicitly to concede that the Constitution licenses legislatures to create throughout American society corporative-state arrangements that parallel Italian fascism.

This Court can take no consolation in the errant hope that its summary disposition of No. 82-901 involves only the narrow field of "public employment", "labor relations", or "terms and conditions of employment". To the contrary: Its action logically extends to every aspect of American economic and social life.

The District Court held that a legislature violates no constitutional provision by granting a private group the power to require public officials to negotiate the content of public policy respecting "terms and conditions of employment" in the community colleges. But the power to determine "terms and conditions of employment"—including wages, hours, and kindred matters—for public employees is "[o]ne undoubted attribute of state sovereignty".[90] If a legislature may uniquely empower private group *A* to "meet and negotiate" and "meet and confer" concerning "[o]ne undoubted attribute of state sovereignty", it may similarly empower private groups *B, C, D,* and so on to "negotiate" and "confer" on every other such attribute. Rightly or wrongly,[91] this Court has held that the na-

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[90] National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[91] *See, e.g.,* B. Siegan, *Economic Liberties and the Constitution* (1980); Vieira, "Rights and the United States Constitution: the Declension From Natural Law to Legal Positivism", 13 *Georgia L. Rev.* 1447, 1475-94 (1979).

tional and state legislatures have virtually unlimited power to regulate "economic" and "social" matters. Each area of regulatory authority constitutes an "attribute of [governmental] sovereignty". Therefore, on the strength of the District Court's decision, as affirmed in No. 82-901, *every* "economic" and "social" question in American life is potentially the subject of a separate, monopolistic system of "negotiation" and "conference" between public officials, on the one side, and some politically influential private special-interest group, on the other. In short, under color of this Court's decision-by-default in No. 82-901, *all* of American society can be re-structured along NIRA corporative-state lines, *as certain groups are already advocating in the name of "industrial policy".*[92]

Thus, under color of this Court's decision-by-default in No. 82-901, the United States could soon find itself, once again, aping the *opera buffa* political economy of fascist Italy! For, certainly, if the Constitution permits the State of Minnesota to impose PELRA's "meet-and-negotiate" and "meet-and-confer" systems on public employees such as Knight, it also permits establishment (at either the state or national level) of the full-blown fascist system—both PELRA and the Italian corporative state being, from the perspective of political economics, identical in structure.[93]

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[92] *See, e.g.*, R. Marshall, *et alia, An Economic Strategy for the 1980s: The Failure of Reagonomics and the Full Employment Alternative* (1982), at 44-47, *in* Appendix hereto.

[93] As Professor Krauss explained at trial, the corporative-state structure of Italian fascism was "identical to the structure [of NIRA] in the Schechter case", from which structure PELRA evolved. T. at 1357-58. Indeed, the connexion between NIRA and

As is common knowledge,

> the corporate state is a view of society that sees the community as composed of diverse economic or functional groups * * *; in theory it would make the basic governmental unit the group or corporate body rather than the individual. Members of the central governing body would represent specific functional groups * * *.
>
> Corporativism was an important feature of Italian fascism * * * [in which] the corporate organization evolved out of the peculiar Fascist unions, or syndicates * * *."

More specifically, as under PELRA, "[f]ascist legislation recongise[d] certain Occupational Associations as * * * officially representing a category of workers".[93] "The establishment of these associations may be regarded as the first practical result on a large scale of the corporative policy * * *."[94] Under the Italian system, as under PELRA, these "legally recognised associations enjoy[ed] important privileges which assure[d] them a fundamental influence in the economic and political life of the country and, at the same time,

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Italism fascism is historically notorious, even to non-economists. *See, e.g.*, "Notable and Quotable", Wall Street J., 29 October 1980, at 28, cols. 4-5, *quoting* Vice President Henry A. Wallace describing "[t]he setup in [NIRA]" as "a type of fascism", and Secretary of Labor Frances Perkins equating NIRA with "the corporate state" of Italian fascism.

[93] 6 *Encyclopaedia Britannica*, "Corporate State", 524 (1963 ed.).

[94] F. Pitigliani, *The Italian Corporative State* (1933), at 20. *Compare* Minn. Stat. §§ 174.63, subds. 5-6; 179.65. subd. 2; 179.67.

[95] F. Pitigliani, *ante* note 95.

financial independence".[97] Of most immediate consequence, each "syndical organization recognized by the government acquire[d] juridical personality and the exclusive right of representing all workers * * * within its occupational * * * jurisdiction in making collective contracts governing labor conditions".[98] Indeed, just as under PELRA, central and essential to the entire Italian system was exclusive representation: The privilege "of existing as a separate legal entity and of representing all the members of a given occupational group whether they belong to the syndicate or not, [was] the fundamental prerogative of the Fascist syndical association".[99] Through their official positions and status as exclusive representatives, these "legally recognized occupational associations ha[d] a control over the economic life of the country, inasmuch as they regulate[d] by means of collective labour contracts * * * the demand and supply of labour, the remuneration of every category of workers * * *, and

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[97] *Id.* at 23. *Compare* Minn. Stat. §§ 179.65, subd. 4; 179.66, subds. 3-4, 7.

[98] G. L. Field, *The Syndical and Corporative Institutions of Italian Fascism* (1938), at 69. Typical are the following provisions of fascistic law: "Only one [syndical] association for each class of * * * workers * * * shall be recognized by law." Law of 3 April 1926, No. 563, On the Legal Discipline of Collective Labor Relations, art. 6. "[O]nly a syndicate legally recognized * * * has the right legally to represent the entire class of * * * workers for which it has been formed, * * * to negotiate collective labor agreements binding upon all members of that class, to levy contributions and to exercise such functions of public interest as may be delegated to it." Charter of Labor, art. III. *Compare* Minn. Stat. § 179.66, subd. 7.

[99] W. Welk, *Fascist Economic Policy* (1938), at 76.

the standards according to which production [was] carried on".[100] The "collective trade agreements * * * constitute[d] the disciplinary factor in the corporative economy", and embodied "[t]he most striking results of the work of these [Occupational] Associations".[101] As under PELRA, "[a] quasi-legislative character [was] imputed to the negotiation of collective labor contracts by the official syndicates, * * * since the contracts * * * [were] binding upon others than the actual members of the associations contracting".[102] Moreover, as under PELRA, "[o]nly the legally recognised associations [in the Italian fascist system] ha[d] the right to nominate the representatives * * * of the workers * * * on the organs or councils on which such representation [was] contemplated by the laws".[103] And, as under PELRA, only these associations had

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[100] F. Pitigliani, *ante* note 95, at 23.

[101] *Id.* at 23, xi.

[102] G. L. Field, *ante* note 98, at 100. *See* Law of 3 April 1926, No. 563, On the Legal Discipline of Collective Labor Relations, art. 10: "Collective labor agreements, negotiated by legally recognized [syndical] associations of * * * employees, shall apply to all the * * * employees * * * of the professional class to which the collective arrangement refers and whom such associations represent * * *."

Compare Steele v. Louisville & N.R.R., 323 U.S. 192, 198, 202 (1944) ("the [exclusive] representative is clothed with power not unlike that of a legislature"), *with* Abood, 431 U.S. at 252-53 (Powell, J., concurring in the judgment) ("collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals").

[103] F. Pitigliani, *ante* note 95, at 24. *Compare* Minn. Stat. §§ 179.65, subd. 1; 179.66, subd. 7.

"the right to levy an annual contribution on all the persons represented by them, whether members or not".[104]

This Court's decision-by-default in No. 82-901, then, will evidence to every thinking person the judiciary's acquiescence in "the first practical result on a large scale of the corporative policy", through the establishment of compulsory collective bargaining and exclusive representation in public employment. This acquiescence will inevitably embolden the partizans of corporativism in every area of economic and social activity to demand increasing delegation to private special-interest groups of "control over the economic life of the country", through "collective agreements" of one sort or another. And, worst of all, this acquiescence will color the legitimacy of corporative-state institutions, even though neither Appellants nor the District Court offered a rational constitutional theory in support of the PELRA's "meet-and-negotiate" provisions, and notwithstanding that *Schechter, Carter,* and this Court's political-equality cases have already declared impossible the fashioning of such a doctrine.

Under these circumstances, it is naive to advise that, "[f]or protection against abuses by Legislatures[,] the people must resort to the polls, not to the courts".[105] For compulsory public-sector collective bargaining through exclusive representation subverts the processes of representative government, discriminatorily enhancing the political power and influence of the private

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[104] F. Pitigliani, *ante* note 95, at 25. *Compare* Minn. Stat. § 179.65, subd. 2.

[105] Munn. v. Illinois, 94 U.S. 113, 134 (1877).

special-interest groups granted the status of exclusive representatives, at the expense of all other citizens.[106] Therefore, even if the people were aware of what is actually at stake with respect to exclusive representation, the more that system perversely insinuates itself into the fabric of public employment, the less they can effectively "resort to the polls" for redress. In fact, however, with this Court's summary affirmance in No. 82-901, *the people are not aware of what is going on precisely because the Court has kept them in ignorance.*

Perhaps some as-yet-unarticulated re-interpretation of constitutional law supports this Court's silent abandonment of *Schechter* and *Carter,* and its apparent embracement of corporative-state principles. Or, perhaps some as-yet-undisclosed revision of constitutional history illuminates the true character of the Founding Fathers as the "Founding Fascists", who anticipated by almost a century and a half the economic acumen, statecraft, and concern for individual liberty of *Il Duce* Benito Mussolini. But, if such a re-interpretation or revision does exist, this Court has at least a moral responsibility to present it explicitly to the American people, that they can recognize the true nature of their governmental institutions, and act intelligently on the basis of that knowledge.

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[106] R. Summers, "Public Sector Collective Bargaining Substantially Diminishes Democracy", *Gov't Union Rev.*, Vol. 1, No. 1 (Winter 1980), at 5; E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980).

IV. The integrity of the process of judicial review demands that this Court explicitly address the constitutionality *vel non* of exclusive representation, and either enforce *Schechter*, *Carter*, and its political-equality decisions, or explain candidly to the nation why, and to what extent, it deems those decisions inapplicable or overruled.

Disposing of the issue of the unconstitutionality of exclusive representation in public employment through a summary decision is unconscionable. If this Court believes the District Court correctly ruled that *Schechter* and *Carter* lack "continuing vitality", and that a grant of monopolistic political privileges to a private special-interest group has "no constitutional significance", then it should frankly explain to the American people the basis for these beliefs. For nothing the District Court wrote provides such an explanation. Or, if this Court believes that the result the District Court reached was proper for reasons other than those the latter Court stated, then it should enucleate those other reasons, rather than suffer the public to assume that the summary affirmance in No. 82-901 betokens the Court's wholehearted acceptance of corporative-state philosophy.

Otherwise, even a not-overly-cynical observer must likely conclude that: (i) This Court cannot rationally justify exclusive representation in public employment as consistent with *Schechter*, *Carter*, and its political-equality decisions. (ii) For reasons unconnected to constitutional law, this Court desires to sustain exclusive representation anyway, at least where the system favors labor unions in general, or an affiliate of the politically powerful National Education Association in particular. And (iii) although an honest affirmance of the District Court's opinion demands explicit rejection

of *Schechter, Carter,* and the political-equality decisions, this Court seeks to avoid responsibility for foisting corporative-state institutions on the American people by hiding the significance of what it has done behind the opaque screen of a summary disposition. Or, even worse, (iv) this Court desires, not only to preserve exclusive representation for labor unions, but also to retain *Schechter* and *Carter* as authorities capable of invalidating corporative-state arrangements that might at some future date favor private special-interest groups other than unions, in order to secure for unions alone an economic and political status superior to that of anyone else.

Obviously, the integrity of the very process of judicial review, not to emphasize this Court's own reputation as a disinterested arbiter of constitutional issues, cannot long survive a public perception that the Court is but a partizan of one or another special-interest group. However, the summary affirmance in No. 82-901 can have no effect other than promoting, if not confirming, such a perception. But, happily, this Court has never treated its summary decisions as of great value as precedent, or refrained from giving full consideration to a question simply because it had been the subject of previous summary action.[107] Therefore, the improvident decision in No. 82-901 interposes no bar to consideration in these appeals of the unconstitutionality of exclusive representation.

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[107] Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring); Richardson v. Ramirez, 418 U.S. 24, 82 n.27 (1974) (Marshall, J., dissenting).

CONCLUSION

This Court should vacate its summary affirmance in No. 82-901 and: (i) affirm the decision of the District Court that PELRA is unconstitutional insofar as it licenses MCCFA, as exclusive representative in the community colleges, to monopolize the "meet-and-confer" process by virtue of its unconstitutional status as such representative; and (ii) reverse the decision of the District Court sustaining the validity of exclusive representation under PELRA's "meet-and-negotiate" provisions; or, in the alternative, (iii) order the parties to submit further briefs, and itself schedule oral argument, on the issues Knight and the other faculty-members originally raised in No. 82-901.

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16 August 1983

APPENDIX

Excerpt from R. Marshall, *et alia*, *An Economic Strategy for the 1980s: The Failure of Reagonomics and the Full Employment Alternative* (1982)

APPENDIX

Rebuilding American Industry

The essence of sound economic policy in the future will be to integrate the wide variety of public and private sector decisions that bear on the nation's capacity to achieve full employment, economic growth and stable prices. A means must be created to establish and discuss realistic long-term goals, review private sector responses to public sector stabilization policies, resolve conflicting objectives, and construct the proper mix of general and selective policies. To be effective, such discussions must involve all the major concerned parties—industry, labor and government.

Such consultative forums have worked well in this country. The Steel Tripartite Committee, formed in 1977, brought together the leadership of the steel industry, labor, and the heads of government agencies to examine the industry's problems of international trade, occupational safety and health, environmental protection, investment taxes, plant closings and worker/community adjustment programs, and new technology for steel production. In the summer of 1980, the Steel Tripartite Committee made a wide-ranging set of recommendations to the President, many of which were accepted, [45] leading to the widely acclaimed "steel stretch-out" for meeting environmental deadlines and other policy changes. The Construction Industry Coordination Committees have brought together labor, construction management, and concerned government officials to develop ways to reduce the extreme seasonal fluctuations in construction activity—fluctuations that add to inflationary pressures by creating manpower and resource shortages in the construction industry. Other recent examples include the airline and coal industries. For more general economic policy consultation among business, labor, and government we have the examples of the Reconstruction Finance Corporation (RFC) and the War Production Board from the 1930s and 1940s.

Bringing together the experience and expertise of labor, management, government and others with a stake in the future of our economy would undoubtedly improve our ability to target scare resources and revitalize our economy. In many areas we suffer not from a shortage of resources, such as investment capital, but rather from an inefficient allocation of those resources among industries and among uses. The challenge today calls for a forum for building a policy consensus to address such necessary questions as inflation and the reconstruction of our aging and weakened industrial base, including transportation, communication and energy-providing facilities.

• • • •

[46] Since existing formal or informal institutions are not sufficient, a National Economic Policy Board (NEPB) should be created. The members of the board would include labor, business, government and independent experts. The Federal Reserve Board also should play an active role.

First, the board would provide a means through which discussions could be held regularly on economic performance and forecasts, stabilization policies and the reaction of private sector institutions. In addition, it would be a major mechanism for providing continuity in economic policy, particularly as Administrations change.

Second, the board would provide the right framework for working out the incomes policy needed in the fight against inflation. The major elements of the economy would be represented, and in the board they would also have responsibility for the overall economic policies into which successful wage and price policies must fit.

Third, the board would be the vehicle for framing a coherent industrial policy. The U.S. already has an industrial policy, but it is not the result of clear and systematic thinking. Trade policy, taxes, regulations, energy, and even interest rates have a significant impact on the structure of

the economy and the opportunities, or lack of them, for industries and firms. In order to resolve structural problems, anticipate future needs, and intgrate sector policies with stabilization policies, it is time to coordinate those decisions and at the least understand their consequences. • • •

To build an appropriate American industrial policy, the NEPB would create under its auspices a series of industry committees composed of the labor, business and government leadership involved in each particular sector. Although each industry committee would establish its own agenda and work to examine and solve industry-specific problems, the board would [47] have the responsibility to balance competing interests across industries and identify larger issues that could be addressed through general policies.

In addition to industry committees, regional committees should be established on a representative basis to study and make recommendations on the needs of particular geographic regions of the country, including the special needs of our older urban areas. Within the framework of general economic policies, specific industries and regions have specific problems best served by targeted solutions. The work of the board and its industry committees should be augmented by an industrial development bank to channel investment into long-term economic development. Such a bank would be closely tied to the board in its operations and could be financed largely by private resources with special consideration given to using pooled pension fund money.

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Nos. 82-977 & 82-898

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD
FOR COMMUNITY COLLEGES,
Appellant,

and

MINNESOTA COMMUNITY COLLEGE
FACULTY ASSOCIATION,
MINNESOTA EDUCATION ASSOCIATION,
and NATIONAL EDUCATION ASSOCIATION,
Appellants,

v.

LEON W. KNIGHT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA, FOURTH DIVISION

REPLY BRIEF OF APPELLANT LABOR ORGANIZATIONS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
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REPLY BRIEF OF APPELLANT LABOR ORGANIZATIONS

INTRODUCTION

Appellants Minnesota Community College Faculty Association ("MCCFA"), Minnesota Education Association ("MEA") and National Educational Association ("NEA") (collectively referred to as the "appellant labor organizations"), file this brief in reply to the briefs of the appellees in Nos. 82-898 and 82-977.

ARGUMENT

A. Appellees Have Suffered No Infringement Of Their First Amendment Rights

Appellees make three concessions of fundamental importance. First, appellees concede that neither the First nor the Fourteenth Amendments grant to community college instructors the right to meet and confer with appellant Minnesota State Board for Community Colleges ("State Board"). The meet and confer right arises solely from statute. Brief of Appellees, No. 82-898, 3-5. Second, appellees concede that the meet and confer function may occur on a representational basis. Brief of Appellees, No. 82-898, 20-21. Third, appellees concede that they can and do express their views to community college administrators outside the meet and confer process. Brief of Appellees, No. 82-898, 11. Appellees nevertheless claim that their exclusion from participation as members of the MCCFA's meet and confer committees is an unconstitutional discrimination which is "repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

While the appellees, unlike the lower court, purport to invoke the Equal Protection Clause of the Fourteenth Amendment in support of the lower court's judgment, their argument

adds little to the analysis of this case. This Court noted in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972), that a classification which is challenged on the basis that it discriminates according to the content of protected speech activity involves a situation where "the equal protection claim is closely intertwined with First Amendment interests." Where a governmental action discriminates on the basis of protected First Amendment interests, the action will be "carefully scrutinized" and must be supported by "a substantial governmental interest." *Id.* at 99. This analysis does not avoid the central question before the Court: whether PELRA's "meet and confer" provisions, as applied by the MCCFA and the State Board, infringe upon First Amendment interests. If the "meet and confer" system does not impinge appellees' First Amendment interests, then it does not burden a fundamental right and "need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the constitution." *Perry Education Ass'n v. Perry Local Educator's Ass'n*, —— U.S. ——, 74 L.Ed.2d 794, 810 (1983).

In the initial brief, appellant labor organizations set forth several reasons why PELRA's meet and confer provisions, as applied, do not infringe upon appellees' First Amendment rights. None of these reasons have been persuasively refuted by appellees.

First, appellees have no First Amendment right to compel the State Board to listen and respond to them. This the appellees concede. It follows from this proposition that the government may decide, unencumbered by constitutional restraint, with whom it will confer concerning policy decisions. Were this not the case, the decision of a governmental official to

confer with one person or group would necessarily create a right to confer with that governmental official in any other person or group which asserted a right to equal treatment. Effectively, the result would be the creation of a right which appellees' concede they do not have: the absolute right to compel the government to listen and respond. The only other theoretical possibility would be the plainly implausible suggestion that the government official consult with no one. Where the government creates a forum, public or non-public, certain constitutional constraints may apply in limiting access to that forum. Where the activity in question, however, is private consultation by governmental officials, no forum exists and the First Amendment does not dictate with whom the government must consult. Because meet and confer is such consultation, appellees raise no First Amendment interest when they complain of exclusion from meet and confer committees.

Second, even if meet and confer is treated as a non-public forum, the limitations of access which exclude appellees from being on the MCCFA's meet and confer committees are reasonable and do not amount to an effort to suppress appellees' expression because the state opposes their views. Meet and confer thus passes muster under *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra*. Appellees, for their part, ignore *Perry Education Ass'n*.[1] In doing so, appellees ignore decisive precedent that a public employer's decision to limit

[1] In their brief in No. 82-977, the appellees assert that *Perry Education Ass'n* does not preclude their argument that the entire concept of exclusive representation is unconstitutional. Brief of Appellees, No. 82-977, 14, 23-24. In the brief which addresses the issues raised by this appeal—that in No. 82-898—the appellees fail to even cite *Perry Education Ass'n*.

access to a non-public forum to the exclusive representative of that employer's employees is reasonable and content-neutral.

Third, any distinction which is made in the selection of the meet and confer representative is based only on who was and who was not selected by the majority of community college faculty members to be their meet and confer representative. PELRA provides that there is only one meet and confer representative. Where a meet and negotiate representative has been selected by the employees, that representative is also the meet and confer representative. *See*, Brief of Appellant Labor Organizations, 6-7, 31-35. Having been selected in a democratic manner encompassing all faculty members to function as the meet and confer representative, the MCCFA chooses persons to speak for it in meet and confer sessions. This selection process is no different than the selection of persons to perform any number of functions on behalf of the organization—from election of officers to selection of a negotiations team. No one would argue that a non-member of an organization has any right to participate in choosing that organization's officers. Indeed, this Court has held that the First Amendment freedom of association of the members of an association is violated where the state acts to force the involvement of outsiders in the internal functions of that association. Thus, in *Cousins v. Wigoda*, 419 U.S. 447 (1975), the Court ruled that a state could not constitutionally override the procedures established by the Democratic National Party for selection of delegates to the party's national convention. Similarly, the Court ruled in *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), that the First Amendment right of association precluded a state from indirectly interfering with the process by which delegates are chosen to the Democratic National Convention. In that case,

the state law requiring that delegates to the convention be bound by the results of Wisconsin's "open" presidential primary election was found to be an unconstitutional interference with the National Party's rules limiting the right to participate in delegate selection to persons declaring preference to the Democratic Party. The MCCFA and its members also have the First Amendment right to limit participation on the committee which will represent the MCCFA in the meet and confer process to those persons who are members of the association, and can be expected to express the views of the organization and which are also the views of the majority of community college instructors who selected that organization.

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.

L. Tribe, *American Constitutional Law*, 791 (1978).

The lower court and the appellees purport to meet this contention by asserting that in the system of academic governance used in some community colleges prior to PELRA, faculty members "had the right to vote for individual representatives that would deal with the issues of college and faculty governance." Brief of Appellees, No. 82-898, 14. They further argue that the democratic selection of the MCCFA "deprived Knight and other non-members of that organization of the opportunity they enjoyed prior to PELRA to participate equally with all faculty members in faculty governance . . ." *Id.* This statement, of course, is false. The appellees were *part* of the process which designated the MCCFA as the meet and confer representative.

PELRA does not, as argued by appellees, grant individual professional employees the right to meet and confer "and then discriminatorily withdraw that right simply because they choose to remain nonmembers of the exclusive representative, MCCFA." Brief of Appellees, No. 82-898 at 5. PELRA grants to professional employees only a right to participate in designating a meet and confer representative. The same provision which establishes the meet and confer right requires that meet and confer occur through a single representative. Minn. Stat. §179.73 (1982). PELRA reduced the number of governance representatives with which the state desired to confer to one. It ultimately is this reduced number which is at the heart of appellees' complaint. And yet, appellees and the lower court have conceded that meet and confer may occur through a representational system. At no time have the appellees quoted authority or even argued that the First Amendment or any other provision of the Constitution dictate the number of representatives which must be established in such a system. Given that PELRA has permissibly established that meet and confer occur between the employer and a single representative, and given that the selection of that representative has occurred on a democratic basis, appellees claim can be seen for what it is: Unhappiness over their failure to be elected by their colleagues. Further, the relief which they desire is revealed as equally unpalatable: A desire to force themselves and their views upon an unwilling majority of faculty members.

B. Compelling Governmental Interests Support PELRA's Meet And Confer System

In the initial brief, appellant labor organizations argued that the substantial governmental interest in promoting labor peace supports PELRA's meet and confer structure. The goal of labor peace has been found to justify collective bargaining by an exclusive representative in both public and private sectors. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The policies found compelling in the context of negotiating terms and conditions of employment are just as persuasive in the meet and confer context.

In response, the appellees dwell upon the provision of PELRA which establishes the meet and confer procedure in order "to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas." Minn. Stat. §179.73 (1982). This provision, viewed in isolation, might arguably support the establishment of meet and confer procedures which do not involve the exclusive representative. However, the meet and confer procedure must be viewed in the context of the overriding goals of the statute: Attaining labor peace through an orderly process which establishes "special rights, responsibilities, procedures and limitations regarding public employment relationships . . ." Minn. Stat. §179.61 (1982). This orderly process in the case of meet and confer is achieved through Minn. Stat. §179.66, subd. 7:

> The employer shall not meet and negotiate or meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit or as provided

> for in section 179.69, subdivision 1, provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment.

The reasons why this overriding policy supports the meet and confer structure established by PELRA have previously been discussed at length. Summarized, any meet and confer procedure which operates other than through the exclusive representative would undermine the meet and negotiate process, would decrease the effectiveness of faculty input in meet and confer, would result in confusion in the presentation of employee views, and would subject the employer to conflicting demands. Appellees fail to address these contentions.

Appellees argue that knowledge and expertise is not "a peculiar attribute of members of MCCFA." What *is* a peculiar attribute of the MCCFA, however, is its status as the spokesperson for a majority of faculty members. As they have acknowledged, appellees have the right to communicate their ideas and express their views to college administrators on an informal basis. The state has a compelling interest, however, in recognizing an exclusive spokesperson for the faculty, and meeting and conferring with that exclusive representative concerning the overall faculty viewpoint on proposed policy decisions.

C. Even If PELRA's Meet And Confer Procedure Is Unconstitutional, The Lower Court's Ordering Of Cumulative Voting Was Erroneous

Appellees do not argue that the First Amendment directly requires that cumulative voting be used in conducting meet and confer elections. Rather, argue appellees, cumulative voting was a permissible remedy to overcome the "discrimination" of the meet and confer procedure.

Appellees incorrectly perceive this case as one involving lingering effects of whatever constitutional violation may have occurred. This is not a case comparable to, for example, a history of employment discrimination in hiring where a remedy of quotas in hiring is imposed to rectify past discrimination in hiring without ordering the immediate termination of white male employees who unknowingly benefited from the employer's discriminatory conduct. Upon the lower court's order in this case, the entire meet and confer committee was elected in a general election among faculty members. Whatever constitutional violation which existed was extinguished with the replacement of the MCCFA-appointed meet and confer committee with the elected meet and confer committee.[2] If appellees, as they conceded, have no First Amendment right to a system of cumulative voting, then cumulative voting may not be imposed as a remedy. This court has recognized "fundamental limitations on the remedial powers of the federal courts" which include the following proposition: "Those powers could be exercised only on the basis of a violation of

[2] Appellees are again compelled to admit to the reality that the MCCFA enjoys substantial majority-support among the faculty and, therefore, they are unwilling to permit an open democratic selection process serve to determine their representative.

the law and could extend no further than required by the nature and extent of that violation." *General Bldg. Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375 (1982). In this case, the lower court overstepped those fundamental limitations by imposing cumulative voting in its supplemental order.

D. Appellees' Brief In No. 82-977 Fails To Address The Issues As To Which This Court Has Noted Probable Jurisdiction

In their brief in No. 82-977, appellees argue that any system of exclusive representation is constitutionally invalid because it unlawfully delegates governmental sovereignty. This is the same thesis forwarded in the appellees' appeal to this Court in *Knight v. Minnesota Community College Faculty Ass'n.* No. 82-901, as to which the Court summarily affirmed. Appellees' arguments in this regard must be rejected as inconsistent with the Court's affirmation of exclusive representation in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, —— U.S. ——, 74 L.Ed.2d 794 (1983). For a further discussion of the appellees' contentions, the Court is respectfully referred to the Motion to Affirm of Appellant Labor Organizations in No. 82-901.

Appellees' arguments concerning exclusivity also fail because of the non-binding nature of the meet and confer process. The MCCFA does not enter into a written contract through the meet and confer process which is then binding on the employer and all bargaining unit members. The employer has the obligation to listen and respond in meet and confer, but it retains the total decision-making authority on issues discussed. Thus, whatever the appellees may find objectionable about exclusive

representation in the context of the negotiation of a collective bargaining agreement has no application to the meet and confer process.

CONCLUSION

Based on the foregoing, the appellant labor organizations reiterate the request for relief contained in their Brief on the Merits.

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Leon W. Knight, et al.,

Appellees.

On Appeal from the United States District Court
for the District of Minnesota

MOTION TO STRIKE APPELLEES' BRIEF

Appellants hereby move the Court to strike the Brief of the Appellees in its entirety pursuant to Rule 34.6 on the basis that it is burdensome, irrelevant and immaterial. The Brief of Appellees is devoted to issues presented to this Court in their unsuccessful appeal in Knight v. Minnesota Community College Faculty Association, No. 82-901. The Court summarily affirmed the lower court decision in that case by order dated March 28, 1983. The appellees have not at any time petitioned for a rehearing concerning the summary affirmance. Because appellees seek to re-litigate the Court's summary affirmance order in their brief on the merits in this case, appellants move that the brief be stricken.

Appellees initiated this action in the lower court to challenge the constitutionality of certain provisions of Minnesota's Public Employment Labor Relations Act ("PELRA"), Minn. Stat. §§179.61-179.76 (1982). PELRA establishes a comprehensive framework for collective bargaining by Minnesota's public employees,

which includes the recognition of exclusive representatives to carry out collective bargaining on behalf of appropriate units of public employees. Appellees' primary claim was that appellant Minnesota Community College Faculty Association ("MCCFA") could not constitutionally act as an exclusive representative of the instructors employed in Minnesota's state community college system. A central contention of this claim was that any system of exclusive representation amounted to an improper delegation of governmental sovreignty contrary to this Court's rulings in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Carter v. Carter Coal Co., 298 U.S. 238 (1936). As a separate claim, the appellees asserted that PELRA"s "meet and confer" procedures violated their rights under the First Amendment.

In its order, the lower court squarely rejected the appellees' delegation argument and upheld PELRA's exclusive representation provisions. The appellees filed their appeal on September 30, 1982. In their Jurisdictional Statement, appellees phrased their first "Question Presented" as follows:

> I. Is the Minnesota Public Employment Labor Relations Act (PELRA) repugnant to the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, because it requries an agency of the State of Minnesota to negotiate terms and conditions of employment for Appellants and other of the State's community-college faculty with the Minnesota Community College Faculty Association (MCCFA), a self-interested private organization, thereby:
>
> > A. delegating to MCCFA a legislative power to make public policies binding on Appellants; and
> >
> > B. depriving Appellants and all other non-members of MCCFA throughout Minnesota of legal equality of opportunity to influence the course of public-policy decisionmaking in the community colleges?

Jurisdictional Statement, No. 82-901, i. This Court summarily affirmed that aspect of the lower court decision in No. 82-901 on March 28, 1983.

The lower court sustained appellees' contention that PELRA"s "meet and confer" provisions, as applied, violated appellees' First Amendment rights. The "meet and confer" issue (as well as the lower court's apportionment of costs) was appealed by the Appellant Labor Organizations in No. 82-977. Appellant Minnesota State Board for Community Colleges also appealed the "meet and confer" issue in No. 82-898. On the same date that the Court summarily affirmed in 82-901, the Court noted probable jurisdiction in Nos. 82-898 and 82-977, consolidating the two appeals for oral argument.

A review of the appellees' brief on the merits in No. 82-977 indicates that the entire brief is an attempt to re-litigate, and to insert into oral argument, the issues as to which the Court summarily affirmed in No. 82-901. From the Question Presented to the Summary of Argument and throughout their 50-page brief, appellees are asserting the delegation argument based on Schechter and Carter, in an attempt to challenge PELRA's system of exclusive representation. Nowhere is appellees' attempt to challenge the Court's summary affirmance in No. 82-901 more brazen than in the Conclusion to their brief:

> This Court should vacate its summary affirmance in No. 82-901 and: (i) affirm the decision of the District Court that PELRA is unconstitutional insofar as it licenses MCCFA, as exclusive representative in the community colleges, to monopolize the "meet-and-confer" process by virtue of its uncontitutional status as such representative; and (ii) reverse the decision of the District Court sustaining the validity of exclusive representation under PELRA"s "meet-and-negotiate" provisions; or, in the alternative, (iii) order the parties to submit further briefs, and itself schedule oral argument, on the issues Knight and the other faculty-members originally raised in No. 82-901.

Brief of Appellees, 50.

The appellees have had a fair and complete opportunity to fully litigate the issues presented in No. 82-901 as to which this Court has ordered summary affirmance. The appellants should not be further burdened with responding to the Brief of Appellees

in No. 82-977 which again presents these same issues, either in a reply brief or in oral argument. Appellants therefore move the Court to strike the brief in its entirety.

Date: September 28, 1983

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY

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STATE OF MINNESOTA)
) ss. **AFFIDAVIT OF SERVICE BY MAIL**
COUNTY OF RAMSEY)

MARIANN MACALUS, being first duly sworn on oath, deposes and says that on the 28th day of September, 1983, she served the attached **MOTION TO STRIKE APPELLEES' BRIEF** upon the following named persons and their respective addresses (which are the last-known addresses of said persons) by placing a copy of said **MOTION TO STRIKE APPELLEES BRIEF** in envelopes properly addressed and postage pre-paid and placing said envelopes in the U.S. mails at St. Paul, Minnesota.

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MARIANN MACALUS

Subscribed and sworn to before me
this 28th day of September, 1983.

Notary Public

GERALDINE G. KILEY
NOTARY PUBLIC—MINNESOTA
DAKOTA COUNTY
MY COMM. EXPIRES APR. 5, 1989

Office - Supreme Court, U.S.
FILED
JUN 22 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-898, 82-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,
Appellants,
and
MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
MINNESOTA EDUCATION ASSOCIATION, and
NATIONAL EDUCATION ASSOCIATION, *et al.*,
Appellants,
v.
LEON W. KNIGHT, *et al.*,
Appellees.

On Appeal From The United States District Court, District of Minnesota, Fourth Division

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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The American Federation of Labor and Congress of Industrial Organiaztions ("AFL-CIO"), a federation of 99 national and international unions with a total membership of approximately 14 million working men and women, file this brief *amicus curiae* with the consent of the parties pursuant to the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The portion of the opinion below at issue in this Court begins from the proposition that if a state establishes a formal system for conferring with selected members of a state college faculty on matters of college goverance, the right of free speech of the faculty members who are not consulted is impaired. Jurisdictional Statement Appendix No. 82-898 ("Jur. St. App."), at A-20 to A-23. Both sets of appellants respond that the First Amendment provides no individual citizen, nor any government employee, any right to be directly consulted by governmental authorities on matters of governmental policy. With that proposition we are in complete agreement, as we have earlier had occasion to inform this Court. *See* Brief *amicus curiae* for American Federation of Labor and Congress of Industrial Relations in *Madison School District v. Wisconsin Employment Relations Commission*, No. 75-946; *id.*, 429 U.S. 167, 179, n. * (Brennan, J., concurring). Because the appellants in this case are ably demonstrating that this underlying premise of the district court opinion is contrary to the First Amendment law in this Court (*see Perry Education Association v. Perry Local Educators Associations*, —— U.S. ——, 51 L.W. 4165 (Feb. 25, 1983)), we do not address further this aspect of the case.

The district court, however, identified an additional First Amendment interest supposedly impaired by the Minnesota statutory scheme here under attack. The Minnesota Community College Faculty Association ("MCCFA"), the designated representative of community college faculty members for purposes of both bargaining over terms and conditions of employment and meeting and conferring on matters of college governance, chose the individuals who met with the college administrators, and, as a matter of practice, appointed only its own members to these meet and confer committees. The district court held that permitting an organization selected by a majority of the affected faculty (Minn. Stat. 179.67; Jur. St. App., at A-91 to A-95) to determine in this manner who will have

the opportunity formally to discuss academic policy questions with the college administrators "infringes the First Amendment associational rights of faculty members who do not desire to join the MCCFA." Jur. St. App. at A-24.[1] The notion, it appears, is that because the opportunity to participate in the selection of, and to serve on the meet and confer committees is "viewed by some [faulty members] as essential to their role on the faculty" (Jur. St. App. at A-51, ¶ IV(A)(5)), faculty members who would not otherwise do so may decide to join MCCFA. The district court thought it "self evident that one's freedom not to join [MCCFA] . . . is seriously impaired" by this "inducement" to associate with MCCFA.

In its Order of April 5, 1983, the district court went even further in perceiving impairment of a constitutional interest in refusing to associate with a private organization. Under that court's original order, all faculty members were permitted to vote for individuals to serve on meet and confer committees. The MCCFA, however, endorsed a slate of candidates. Because the MCCFA did, after all, have the support of more than half the faculty, its slate was chosen. The district court in its April, 1983 Order maintained that this selection procedure as well, although open to all employees, violated the "First Amendment right[] to . . . association" of nonmembers. Again, the district court's point, as we understand it, is that because membership in MCCFA was, under the election rules used, decisive as a practical matter with regard to direct participation in the meet and confer process, there is an "infringement" of the "freedom not to join" MCCFA.

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[1] The "meet and confer" opportunity is in no way in derogation of any individual faculty member's rights to "communicate . . . [his or her] individual views to administrators." Jur. St. App. at A-50, ¶ III(B)(8); *see also* Minn. Stat. § 179.65, Subd. 1; Minn. Stat. § 179.66 Subd. 7, Minn. Laws 1982, ch. 568, § 2.

It may well be that the district court's "right of non-association" analysis is merely the ultimate extention of its basic misconception regarding the First Amendment implications of selective consultation by governmental entities: If in fact college faculty members had a constitutionally cognizable right to discuss academic policy matters with college administrators, it is possible that limiting the exercise of that right to members of a certain private organiaztion could, absent a compelling overriding justification, run afoul of the constitution. *See Carey v. Brown*, 447 U.S. 455; *Madison School District, supra.* On this view, a determination that there is no constitutional right of access to the offices of college officials for the purpose of compelling discussion on matters of academic policy would determine as well that the officials may, as long as their choice is rationally based, prefer for consultation purposes one organization over another, or over disparate individuals, as readily as those officials might choose one individual over another individual. *Perry Education Association, supra*; *City of Charlotte v. Firefighters*, 426 U.S. 283; *Babbitt v. United Farm Workers*, 442 U.S. 289.

On the other hand, the district court may have viewed the supposed impairment of a constitutionally-based right to refuse to join a private organization as independent of any First Amendment protection of the opportunity to discuss academic policy matters with government officials. On this approach, the critical factor would be that access to an attractive government-conferred privilege or benefit depended upon membership in a particular organization; that the benefit happened to be the opportunity to participate in policy discussions would be immaterial. It is to the latter, limited thesis that this brief is directed.

As we show in Part I of the Argument, *infra*, the viability of this aspect of the district court's decision

turns in the first instance upon the nature and strength of the asserted constitutional interest in non-association. While this Court has often affirmed that First Amendment protections include the right to associate with others for the purpose of advancing ideas, the Court has devoted limited attention to the constitutional protection to be accorded the opportunity to remain isolated from such associational activity. As a general matter, however, this Court has implied from affirmative constitutional rights an obverse right only where the policies underlying the Constitution's protection of the affirmative right justify such a result. Thus, the nature of the constitutional protections accorded the interest in nonassociation cannot be discovered by the simplistic strategem of turning inside out the First Amendment's protection of the affirmative right to associate for the advancement of one's political or other views, or by simply applying in a mechanistic way First Amendment precepts developed in that context. As we go on to demonstrate, the primary interest forwarded by the nonassociational right concept is that relating not to the public interchange of ideas forwarded by the protection of associational rights but to the private interest of individuals in their personal integrity and personal beliefs; indeed, there is a tension between the First Amendment policy of enhancing the public dialogue and an asserted right to isolate oneself from expressive activity by others.

In Part II of the Argument, *infra*, we explore the nonassociational rights claim here in the light of the general points stated in Part I. We explain that in this instance the government, though not compelled to do so by the Constitution, by agreeing to listen to what a particular group wishes to discuss has enhanced both the public dialogue and the associational interests of those who are members of the group. The claim here is that the government may not do so because its actions create an inducement to nonmembers who wish to participate in the discussions to join the group. To recognize a

constitutionally-protected right of nonmembers to curb the ability of government in this manner would be to read the Constitution as erecting a *cordon sanitaire* between the government and private associations of its citizens that would stiltify the government's ability to consult with private associations and to increase—through favorable tax treatment, grants and contracts—the ability of such associations to carry out socially-desirable activity. These deleterious effects on the proper workings of the government in a democratic socieyt are themselves sufficient to require rejection of the nonassociational rights claim in this case. Moreover, this Court in *Regan v. Taxation With Representation*, —— U.S. ——, 51 L.W. 4583 (May 23, 1983), recently rejected in the context of claims resting on the affirmative right of free speech a contention analytically indistinguishable from the district court's ruling here. The Court held that there is no infringement of First Amendment rights where the government treats expression by one group favorably, but not speech by another group. As we show, under the approach taken in *Regan*, the interest in nonassociation here asserted, when examined in light of the freedom of belief value which underlies that interest, can certainly fare no better.

ARGUMENT

I

A. (1) This Court has long recognized, and recently several times reaffirmed, that a right to associate with others for purposes of expressive activity inheres in the First Amendment protections of free speech, free press, and free assembly:

> As we so recently acknowledged in *Citizens Against Rent Control v. Berkeley*, —— U.S. ——, ——, 102 S.Ct. 434, 436, 70 L.Ed.2d 492, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Ibid.* In emphasizing "the important of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *ibid.*, we noted the words of Justice Harlan, writing for the Court in *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488:
>
> > "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."
>
> [*N.A.A.C.P. v. Claiborne Hardware Co.*, —— U.S. ——, 102 S.Ct. 3409, 3423.[2]]

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[2] As a derivative of the express First Amendment rights, the right of free association does not encompass *all* forms or organization or affiliation; only association for purposes of fostering expressive activity is protected. For example, while

> parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desireable, and . . .the children have an equal right to attend such institutions . . . it does not follow that the *practice* of excluding racial minorities from such institutions is also

Thus, because "[t]he Court has long viewed the First Amendment as protecting a market place for the clash of different views and conflicting ideas" (*Citizens Against Rent Control v. City of Berkeley*, —— U.S. ——, 102 S.Ct. 434, 436), the Court has long recognized as well the right of individuals to join together more effectively to compete in that "market place."

(2) The scope of any constitutional right to *refuse* to associate with other individuals in an organization devoted in whole or part to expressive activity is much less developed.[3] The few cases are those concerning union security clauses. *Railway Employees v. Hanson*, 351 U.S. 225 (requiring association through payment of fees by employees to a union that is the employees' exclusive representative does not infringe First Amendment rights); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (expenditure by an exclusive representative of exacted

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> protected by the same principle. [*Runyon v. McCrary*, 427 U.S. 160, 176.]

See generally L. Tribe, *American Constitutional Law*, at 702 (1978).

[3] It is important to distinguish the "right of non-association" the district court relied on here from superficially similar situations in which exercise of the affirmative right to associate leads to adverse action against the person exercising that right. For example, in *Elrod v. Burns*, 427 U.S. 347, 355-56, the plurality held that requiring adherence to one political party in order to retain one's job meant that

> [a]n individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk . . . .

Thus, insofar as *Elrod* is premised on associational rights, that decision involved protection of affirmative rights and not the purely negative right to refrain from associating at all. See Gaebler, *First Amendment Protection Against Compelled Expression and Association*, 23 Boston Coll. L. Rev. 995, 996 n. 4 (1982). See also *Branti v. Finkel*, 445 U.S. 507, 514-516 (*Elrod* also based simply on protecting right to one's own "private political beliefs").

fees on political issues unrelated to collective bargaining interferes with objecting employees' First Amendment rights). *See also Lathrop v. Donohue*, 367 U.S. 820 (plurality opinion) (to require lawyers to pay fees to, but not otherwise to participate in, an organization which is involved in some legislative activity but whose "activities without apparent political coloration are many" (*id.* at 839) does not constitute "any impingement upon protected rights of association" (*id.* at 843)); *see also id.*, at 849 (opinion of Harlan & Frankfurter, JJ.) (agreeing with above, but going on to find no infringement even as to political expenditures); *but see Abood, supra*, 431 U.S., at 234 n.29 (*Lathrop* settled no constitutional question).

In none of these cases was the nature or breadth of the right to refrain from association explored in any depth, but this much is clear: the asserted right to refuse to associate is not entitled to the full measure of solicitude reserved for core First Amendment rights.[4] In *Hanson*, for example, the Court stated that the requirement financially to support the incumbent labor organization is one as to which "[t]he task of the judiciary ends

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[4] As this Court has recognized that expressive activity formerly believed to be outside the First Amendment's protections does in certain circumstances implicate the policies underlying the system of free expression, the Court has at the same time adjusted the applicable doctrinal rules to accurately reflect those aspects of First Amendment values in fact implicated so as to permit the government more easily to justify impairment of these less-central aspects of expression. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50, 70 (plurality opinion); *see also id.*, at 77 (Powell, J., concurring); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-564 (because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising" the government may "ban forms of communication more likely to deceive the public than inform it . . . or commercial speech related to illegal activity" and need not show as strong a governmental interest to sustantiate regulation of other forms of commercial speech); *compare Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 with *In re Primus*, 436 U.S. 412.

once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises" (351 U.S., at 234); and in *Abood*, the Court reaffirmed its *Hanson* holding and deferential approach, despite recognition that First Amendment interests were implicated (431 U.S., at 222-223) and protests in the dissent that the nonassociational interests asserted were not accorded full First Amendment protection (*id.* at 254-55) (dissenting opinion).

Moreover, even as to the First Amendment protection accorded the right to refrain from expressive activity generally, there is relatively little doctrinal development in this Court. Again, the few cases make clear simply: (i) that there are indeed situations in which impairment of an individual's right to refrain from expressive activity so sharply conflicts with the First Amendment value of protecting freedom of belief and of personal integrity as to invalidate the complained of governmental action (*West Virginia Board of Education v. Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705); but (ii) that the First Amendment protection accorded the right to refrain from government compelled expression is not simply the mirror image of the right to speak, and may not pertain in circumstances in which affirmative speech would be fully protected (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74). In *Pruneyard* the Court held that no First Amendment rights of a shopping center owner are infringed by requiring him to allow his property to be used by individuals engaged in communicative activity. If, instead, the state had attempted to *forbid* the shopping center owner from allowing the use of his property by others for political speech activity and thereby supporting their message, there would be no doubt that the owner's First Amendment rights would have been infringed. *Buckley v. Valeo*, 424 U.S. 1; *First National Bank of Boston v. Bellotti*, 435 U.S. 768.

B. While this Court has not had the occasion to explore at any length the appropriate relationship between

the constitutional protection accorded association and the protection accorded a refusal to associate, the Court has in other circumstances made clear that constitutional rights are not to be mechanically read as invariably implying their obverse:

> *The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.* For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli*, 172 F.2d 919, 924 (C.A.3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case in another district, see *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245; *Kersten v. United States*, 161 F.2d 337, 339 (C.A. 10th Cir. 1947), cert. denied, 331 U.S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. [*Singer v. United States*, 380 U.S. 24, 34-35; emphasis added.[5]]

So when the Court, "follow[ing] the approach of *Singer*," determined that the Sixth Amendment's right to counsel guarantee is to be read as providing the right to proceed *pro se*, the Court stressed that "[t]he inference of rights is not a mechanical exercise" and such an "implied right must arise independently from the design and history of the constitutional text". *Faretta v. California*, 422 U.S. 806, 820 n.15.

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[5] *Singer* held that the Sixth Amendment right to trial by jury does not establish a right to a judge trial. One additional example comes readily to mind: The right to be free of cruel and unusual punishment does not imply a mirror-image right to incur cruel and unusual punishment on demand.

In this instance, the constitutional text is of little affirmative aid, since the right of association is itself implied rather than express. The principal "design" of the constitutional protection accorded free association is, however, as we have noted, clear from this Court's cases: By joining together, individuals are able to enhance the strength of their own voices, particularly as to governmental matters, and thereby to foster the free exchange of ideas the First Amendment is itself designed to foster. *Citizens Against Rent Control, supra*; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460. *See also New York Times v. Sullivan*, 376 U.S. 254, 269-70.

A supposed "right" to remain isolated from the expressive activity of others, or not to communicate at all, is wholly divorced from this central First Amendment interest. An individual who refuses to express his or her views, or to associate with others for the purpose of communicating views, is quite obviously not enhancing the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote.

Furthermore, in situations like the instant one, there is no sense in which the government's intervention imposes an official orthodoxy. Instead, the opportunity for meaningful exchange of ideas, and therefore for attaining the ideas of the First Amendment, is enhanced. *Compare West Virginia Board of Education v. Barnette, supra, with Pruneyard Shopping Center, supra.*

Here, for example, the MCCFA's position on academic policy matters is formulated by its members, not by the college administrators, and MCCFA's meet and confer representatives were, originally, chosen by the organization's members. Thus, if a nonmember does decide to join MCCFA in order to have a voice in the meet and confer process, he will, by doing so, in no way contract the public dialogue on the issues involved in academic governance. While the group may ultimately support a position with

which a dissenter disagrees, the dissenter will have the prior opportunity, within the group, to express his or her views, and the subsequent opportunity publicly to argue against the decision reached by the majority of the organization's membership.

It is, of course, true that an individual may object to the fact that through association, ideas opposed to his own may ultimately be magnified in volume and importance. But, as a general matter, the First Amendment does not countenance silencing or quieting some in order to enhance the relative voice of others. "[T]his concept contradicts basis tenets of First Amendment jurisprudence." *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S., at 791 n.30. That is why, for example, this Court refused to approve a state statute providing a "right-of-reply" (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241), and invalidated as well federal limitations on the campaign expenditures of individuals (*Buckley v. Valeo*, *supra*, 424 U.S., at 49).

In sum, governmental action that impares the ability of individuals to remain isolated from the expressive activity of others does not impair the "marketplace of ideas" which the right of free association primarily fosters. This does not, however, end the matter. The First Amendment protects not only speech and association as such, but " the broader concept of individual freedom of mind." *Wooley v. Maynard*, *supra*, 430 U.S., at 714. In those few instances in which this Court has protected the right to refrain from expressive activity, the reason has been that the government has invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." *West Virginia Board of Education v. Barnette*, *supra*, 319 U.S., at 642; *see also Abood v. Detroit Board of Education*, *supra*, 431 U.S., at 234-235; *Elrod v. Burns*, *supra*, 427 U.S., at 356-57. We turn now to a consideration of those cases.

II.

A. It is well at this juncture to recall the context in which this case arises: Minnesota has not compelled any faculty member to become a member of MCCFA. The state has decided, however, that because MCCFA represents a majority of the faculty members, state college administrators are to consult with representatives chosen by MCCFA to hear the latter's views on academic policy matters. Clearly, the overall thrust of this scheme is to create an opportunity, that the state need not provide, for discussion of academic policy matters and, thus, to enhance such discussion. This forwards the major policy concerns underlying the First Amendment's protection of the right freely to associate with others for the expression of views.

It is claimed, however, that by its very determination to respect the decision of the majority of faculty members to associate together the government has impermissibly burdened the nonmembers' decision to remain unaffiliated. Thus, the nonmembers' complaint is that the government has made association more attractive than nonassociation by determining to hear out the enhanced, organized voice of the majority of faculty members. In effect, their argument is that the Constitution, to protect the interest in nonassociation, requires the erection of a *cordon sanitaire* preventing the government from dealing with organizations rather than individuals, or one organization rather than another.

The distortions of the proper workings of the government in a democracy entailed by this argument are sufficient to demonstrate that the First Amendment contains no such doctrine. For example, governmental entities seeking information or counsel on matters before them for decision would be precluded from seeking the views of leaders of major organizations whose members' interests are affected, unless all interested unaffiliated individuals are consulted as well. On the same reasoning, it could become unconstitutional to provide subsidies through the tax system to nonprofit organizations (*see, e.g.*, 26 U.S.C.

§ 501(c)(3)), or to provide governmental grants to certain nonprofit organizations of various types but not to others, or to organizations but not to individuals (*see, e.g.*, 42 U.S.C. §§ 2996e, f(c)).

In a society which has been, from de Tocqueville's day to ours, infused with the energies of private organizations, the theory that the government may not have any dealings with organized groups of its citizens where unaffiliated individuals protest is unworthy of serious consideration. The effect of erecting such a barrier between the government and private organizations would be to read into the free speech clauses of the First Amendment an analogy to the neutrality requirement of the religion clauses. But this Court has expressly held this analogy to be "patently inapplicable" (*Buckley v. Valeo*, *supra*, 424 U.S., at 92), and therefore upheld public support for some but not all political parties as an "effort . . . not to abridge, restrict, or censor speech, but rather to use public money to facilitate an enlarged public discussion [and therefore to] further [] First Amendment values (*id.*; see also *Storer v. Brown*, 415 U.S. 724).

Indeed, the district court's April 5, 1983 order, which was entered to effectuate its basic decision, provides a vivid demonstration of how its over-blown nonassociation theory tends to destroy not only the government's ability to operate in a rational manner in its consultative activities and in allocating other benefits but also the true right of association as stated by this Court. That order conditions the government's beneficial dealings with private organizations on opening up the association's internal decision making process to nonmembers. This command is irreconcilable with the First Amendment:

> [T]he freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. [*Democratic Party of United States v. Wisconsin ex rel LaFollette*, 450 U.S. 107, 122.

See also Rodriquez v. Popular Democratic Party, 457 U.S. 1, 14.]

To compel MCCFA to forego its freedom to limit participation in its deliberations to its members in order to avoid putting nonmembers to a choice between their desire to remain unaffiliated and their desire to be heard by the government is directly to infringe upon associational interests in order to protect against an indirect, remote impact upon nonassociational interests.

B. *Regan v. Taxation with Representation*, *supra*, we submit, confirms the analysis to this point. The Court there decided that, even where *affirmative* interests in expression are asserted, Congress does not impermissibly infringe upon those interests simply by favoring some speech over other speech, as long as the legislature's aim is not to suppress certain ideas:

> [The suggestion] that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech . . . is not the law. Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano v. United States*, [358 U.S. 498], such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combatting teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.
>
> Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. *United States v. Realty Co.*, [163 U.S. 427,] 444 [(1896)]." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937). . . . As

> we said in *Maher* [*v. Roe*, 432 U.S. 464], "[c]onstitutional concerns are greatest when the State attempts to impose its will be force of law . . . ." 432 U.S., at 476. Where governmental provision of subsidies is not "aimed at the suppression dangerous ideas," *Cammarrano, supra*, at 513, its "power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher, supra*, at 476. [*Regan v. Taxation with Representation, supra*, 51 L.W., at 4585-86.]

On this basis the Court concluded that Congress could permissibly subsidize by a tax exemption lobbying by veterans' organizations but not lobbying by other non-profit organizations. And the *Regan* Court's reliance on *Maher v. Roe* confirms that the principle declared in the foregoing passage is not limited to tax exemptions but applies to governmental benefits generally.

Regan's reasoning is dispositive here unless the outcome there would have been different if the constitutional claim had been framed in terms of the putative nonassociational rights of nonmembers of veterans' organizations. But the claim of infringement of nonassociational interests through the indirect sort of governmental "inducement" to associate found here is weaker, not stronger, than the claim of government interference with affirmative speech interests rejected in *Regan*.

First, the concept of governmental interference with freedom of belief supposes direct governmental compulsion, and not simply some action by the government which may influence an individual's decision whether to entertain certain ideas. For, as the Court has recognized, governmental "officials may foster [ideological views] by persuasion and example," (*West Virginia Board of Education v. Barnette, supra*, 319 U.S., at 640); *see also Wooley v. Maynard, supra*, 430 U.S., at 717 (the government may seek to communicate "an official view as to proper appreciation of history, state pride, and individualism"; what the government may not do is to force citizens into

"becoming the courier for such a message"). Thus, only where "compulsion [is] employed [as] . . . a means for [the] achievement" of the government's purpose can it be claimed that there has been an intrusion into one's personal beliefs of constitutional magnitude. *Barnette, supra*, 319 U.S., at 640. *See also First National Bank v. Bellotti, supra*, 435 U.S., at 794 n.34.

Second, the freedom to believe as one wishes is most sharply compromised where the very purpose of the government *is* a didactic one of promoting a certain point of view. *Barnette, supra*; *Wooley, supra*. Where, as here, the government instead has another purpose—and particularly where that purpose is itself consonant with promoting a robust dialogue on issues of public concern—the claim that the government seeks to control one's thoughts, and the likelihood that any individual will in fact feel that his or her personal integrity is under seige, lacks a basis in reality. *Pruneyard Shopping Center, supra*, 447 U.S., at 87.

Third, the claim of an invasion of a First Amendment right to freedom of belief is at its strongest when the governmental intrusion is itself direct and intimate, as was the requirement in *Barnette* that children rise on tehir own two feet and utter government prescribed thoughts out of their own mouths. Thus, "the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate." *Wooley, supra*, 430 U.S., at 715. While that difference proved to be "essentially one of degree" in a context in which the government's primary interest was precisely in promoting an official orthodoxy, such a difference becomes one of kind where the government has no such didactic interest and the connection between the individual and the compelled message or association is attenuated. *Pruneyard Shopping Center, supra*. This, presumably, is why tax payers generally cannot claim impairment of their rights of non-

association because some of their tax monies are paid through government grants to organizations of which they disapprove. It is also why the nonmembers who decide to remain nonmembers cannot claim impairment of their nonassociational rights because MCCFA is recognized in the meet and confer process.

Finally, as we have seen (pp. 12-15, *supra*), the claim of a nonassociational right often arises precisely where the government action enhances the associational rights of others, thereby expanding, rather than contracting, the "marketplace of ideas." In such instances, unlike those in which governmental impairment of freedom of belief has been found, "[t]he freedom asserted by these appellees does . . . bring them into collision with rights asserted by . . . other individual[s]." *Barnette*, *supra*, 319 U.S., at 630.

In sum, both the freedom of belief underpinnings of the nonassociational interest concept and the competing "marketplace of ideas" value which inheres in the affirmative associational right protected by the First Amendment counsel that only where the governmental action is (1) compulsory, (2) based on a didactic purpose, (3) affects individuals directly and intimately, and (4) fails to enhance the opportunity for association for expression by some groups without suppressing particular points of view disfavored by the government is such action open to strict scrutiny. Where, as here, the plaintiff fails to show any of these factors the government's power to allocate benefits among citizens and groups recognized in *Regan* must (assuming, of course, a rational basis for the exercise of that power) prevail.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed.

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IN THE

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OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES *et al.*,
Appellants,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION *et al.*,
Appellants,

v.

LEON KNIGHT *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Minnesota

MOTION OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICUS CURIAE*

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On Appeal from the United States District Court for the District of Minnesota

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MOTION OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS FOR LEAVE TO FILE BRIEF OUT OF TIME

The American Association of University Professors ("AAUP") respectfully moves for leave to file the annexed brief *amicus curiae* in these consolidated cases.

Counsel for all appellants and appellees have consented to the filing of the AAUP's *amicus* brief, and have also authorized us to represent that they have no objection to the extension of time requested in this motion.

A. Interest of Amicus

Founded in 1915, the AAUP is the nation's oldest and largest organization dedicated exclusively to advancing the interests of professors and research scholars in all academic disciplines. The AAUP has approximately 65,000 members in 1300 local chapters on college and university campuses across the country. Since 1972, the AAUP has endorsed and supported efforts by local chapters to engage in collective bargaining activities. Today, approximately sixty chapters are certified as exclusive bargaining representatives and engage in the full range of collective bargaining activities on behalf of faculty members at their institutions.

One of the AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for faculty employment, academic tenure, and the protection of academic freedom. Central among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* prepared jointly by the AAUP and the Association of American Colleges and subsequently endorsed by over one hundred educational organizations and learned societies.[1]

Other AAUP policy statements bear directly on the events that gave rise to the consolidated cases now before the Court. The widely recognized *Statement on Government of Colleges and Universities*, formulated in 1966 by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges,[2] describes the respective responsibilities of the fa-

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[1] The 1940 *Statement* and other AAUP policy statements described in this motion and accompanying brief are reprinted in AAUP POLICY DOCUMENTS AND REPORTS (1977), a copy of which has been lodged with the Clerk. This compendium of policy statements is referred to hereinafter as "*AAUP Documents*." The 1940 *Statement* appears on pages 1 to 4.

[2] *AAUP Documents* 40-44. Appellant Minnesota State Board for Community Colleges is a member of the Association of Governing Boards of Universities and Colleges.

culty, the administration, and the trustees in governing an institution of higher education and establishing institutional policy. The AAUP's 1973 *Statement on Collective Bargaining*[3] endorses the formation of faculty unions as an appropriate mechanism for preserving academic freedom and promoting sound academic government.

Federal and state courts throughout the country have applied AAUP policies to resolve disputes over the terms and conditions of faculty employment. The AAUP regularly participates as *amicus curiae* in cases before this Court that implicate matters of AAUP policy.[4]

B. Reasons for Granting the Motion

The primary issue in these cases is the constitutionality of the process for selecting the faculty members of meet-and-confer committees in the Minnesota Community College system. This issue implicates questions of academic institutional governance, which are the subject of AAUP policies. Because the selection process at issue contra-

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[3] *AAUP Documents* 56.

[4] In recent years, the AAUP has participated as *amicus curiae* in this Court in many cases, including Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); and City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). The Court has referred to AAUP policy statements on several occasions in the past. *E.g.*, Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 756 (1976); Board of Regents v. Roth, 408 U.S. 564, 579 n.17 (1972); Tilton v. Richardson, 403 U.S. 672, 681-82 (1971).

The lower federal courts regularly rely on AAUP policies in prescribing rules of conduct in higher education. *E.g.*, Gray v. Board of Higher Education, City of New York, 692 F.2d 901, 907 (2d Cir. 1982) ("[c]ertain AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies").

venes AAUP principles and traditions of academic governance, we initially assumed that AAUP's *amicus* brief would be due at the same time as the brief of the appellees in late July.

The AAUP's potential *amicus* participation was widely discussed at the AAUP's Annual Meeting on June 18. Thereafter, the decision was made to file an informational brief *amicus curiae* setting forth the Association's policy positions and supporting neither appellants nor appellees on the ultimate question of affirming or reversing the decision of the court below.

Although the AAUP's brief was substantially written, the decisions made on June 18 required revisions and further internal consultation. Printing the brief took several additional days. For these reasons, the AAUP was unable to submit its brief at the time the appellants' briefs were due (June 20), and is filing this motion and its brief seven days thereafter.[5]

The AAUP believes that an extension will not prejudice any party. The appellees, who have consented to the extension, will have sufficient time to respond as appropriate to the points contained in the AAUP's *amicus* brief.

We also believe that the brief may be useful to the Court and parties in illuminating some of the observations on university governance and collective bargaining expressed in the decision of the three-judge district court.

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[5] It is not clear to the AAUP that this motion is necessary. It is filed as a precautionary measure. With respect to the single issue addressed in our *amicus* brief, the AAUP takes a position inconsistent with the Minnesota statute invalidated by the court below and defended by the appellants in this Court. Nevertheless, because we do not address the constitutional issues before the Court and support neither party on the ultimate issue of affirmance or reversal, we have filed this motion in the event that Rule 36.2 is construed to require the filing of our *amicus* brief within the time allotted to the appellants for filing their briefs.

The lower court decision described what it termed the "longstanding tradition of faculty participation in college goverance," and addressed novel questions on the relationship between traditional forms of governance and new alternatives contained in collective bargaining agreements. As an organization that formulates widely followed national standards on these subjects and includes in its membership more than 35,000 faculty members who engage in collective bargaining, the AAUP is uniquely situated to speak to the questions now before the Court.

CONCLUSION

For the foregoing reasons, the AAUP respectfully requests that its motion for leave to file the annexed *amicus* brief be granted.

Respectfully submitted,

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On Appeal from the United States District Court for the District of Minnesota

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE*

This brief is filed, with the consent of all parties, by the American Association of University Professors ("AAUP"), *amicus curiae*.

INTEREST OF AMICUS CURIAE

The interest of the AAUP is described in the accompanying motion for leave to file this brief *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ruling of the three-judge court below was predicated in large measure on assumptions about the manner in which institutions of higher education are governed and the relationship between traditional forms of faculty participation in academic policy making and newer forms involving collective bargaining. This *amicus* brief attempts to develop more fully this aspect of the lower court's decision. The AAUP does not address the constitutional issues raised by this appeal and supports neither affirmance nor reversal of the court's ruling. We seek rather to inform the Court, from our vantage point as an educational organization with two-thirds of a century of experience in academic policymaking, about considerations implicit in the lower court's opinion that may be relevant to the final disposition of these cases.

The strong American tradition of faculty participation in setting educational policy is reflected in the AAUP's 1966 *Statement on Government of Colleges and Universities*, which endorses the concept of a forum for the presentation of the views of the whole faculty. The AAUP's 1973 *Statement on Collective Bargaining* approves of unionization as a mechanism for advancing faculty interests, and also urges a faculty collective bargaining representative to establish democratic structures within the institution providing full participation by all faculty. This brief will examine in some detail the considerations underlying these policy positions.

In Part I of the Argument, we show that faculty members acting through collective governance mechanisms should have primary decisionmaking responsibility in areas relating to educational policy. In Part II, we show that collective bargaining is entirely consistent with traditional forms of academic governance with respect to the faculty's role in educational policymaking. Finally, in Part III, we describe briefly the conclusions reached in 1977, when the AAUP's Standing Committee on College

and University Government examined related developments in the Minnesota State University System.

To comport with normative academic practice as embodied in AAUP policy statements, an institutional forum should exist for the expression and consideration of the views of all faculty members on matters of educational policy. A system of collective bargaining in which the certified agent negotiates on the terms and conditions of employment is not inconsistent with academic practice or AAUP principles. Intimating no views on the constitutional questions before the Court, we urge only that the Court's disposition of these cases be consistent with these principles.

ARGUMENT

AS A MATTER OF SOUND ACADEMIC PRACTICE, FACULTY PARTICIPATION IN THE FORMULATION OF EDUCATIONAL POLICIES SHOULD NOT BE CONDITIONED ON MEMBERSHIP IN A FACULTY UNION.

I. The Nature of Faculty Service to the Institution

Reflecting the experience of the German university in the nineteenth century,[1] American higher education has fostered the concept of faculty influence on the governance of the institution.[2] The model allocation of responsibility

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[1] The abundant literature on the structural origins of the modern American university is cited and well described in Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 822-29 (1983). For a fuller exploration of the same ground, *see* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 209-407 (1955); Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 AM. ASS'N UNIV. PROFESSORS BULL. 124 (1955).

[2] On October 26, 1876 Benjamin Rush, an early trustee of Dickinson College in Pennsylvania, is reported to have written to his fellow trustees: "When our professors cease to be qualified to share in the power of the College, it will be proper to dismiss them, for

places in the hands of the faculty, acting collectively, primary responsibility over education policymaking in such areas as curriculum, methods of instruction, the conduct of academic research, and faculty appointments and promotions. The tradition of faculty control in these and related areas is based on the premise that faculty members can bring collective expertise to bear in shaping the educational mission of the institution, with expression of the range of faculty views assisting in the search for truth.[3]

"The university," an eminent scholar has noted, "differs radically from most other types of organizations, such as governments, business enterprises, or armies, because of the particular purposes of the academic institution."[4] Universities exist to teach students and to advance human learning, tasks that involve intimate relationships between teacher and student on the one hand, teacher and subject-matter on the other.

The implications for university government are clear and immediate. Universities are not governed as other institutions traditionally are:

> . . . The people "on top" in an academic institution are not necessarily the trustees, the president, or the deans, but in many situations the professor-teachers in their lecture halls and seminars or the professor-researchers in their studies and laboratories. Decision-making in the university must involve the teacher-researcher "on the assembly line" because he

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government and instruction are inseparably connected." J. Corson, GOVERNANCE OF COLLEGES AND UNIVERSITIES 97 (1960). See M. Ross, THE UNIVERSITY: THE ANATOMY OF ACADEME 159 (1976).

[3] *See* T. HUNGATE, MANAGEMENT IN HIGHER EDUCATION 66-67 (1964): "The [university's governing] board, in fulfilling its responsibility for management, requires the aid of the faculty . . . in part because the task is too big to be carried out unaided, but more especially because the board does not, unaided, possess the best judgment on all matters involved."

[4] H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT 1 (1972).

> chiefly knows intimately what the "production" of the university is all about; it is his immediate proximity to the personal tensions of learning and scholarly creation which gives legitimacy to much of the decision-making for the academic community.[5]

Shared authority is integral to the concept of an effective university because "the variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence" among components of the institution.[6]

The faculty's authority in matters of educational policy creates a corresponding obligation on the part of individual faculty members to participate in institutional governance—an obligation that is both an ethical canon of the profession and a common criterion for promotion and tenure. Service on institutional or departmental faculty committees is a stated requirement at many institutions. Such service is emphasized in the AAUP's *Statement on Professional Ethics*, which has been adopted at many institutions: "As a colleague, the professor has obligations that derive from common membership in the community of scholars . . . . He accepts his share of faculty responsibilities for the governance of his institution."[7] The ethical obligation is supported by a practical corollary. Factors such as "institutional service" or "campus committee work" are commonly considered, along with teaching and research, in decisions on faculty promotion, tenure, and salary increases.[8] At junior colleges, in fact,

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[5] *Id.*

[6] *Id.* xiii.

[7] *AAUP Documents* 65-66.

[8] At one state-supported institution, for example, faculty members are evaluated for reappointment and promotion on the basis of three criteria: teaching effort and effectiveness, scholarly activity, and "service to the department, the University, [and] the community." Department of Sociology Personnel Policy, Univer-

institutional service may be more important to the career of a faculty member than at four-year institutions where the opportunity for research is correspondingly greater.[9]

In Minnesota, the role of faculty members in institutional goverance is obliquely acknowledged under the Minnesota Public Employment Labor Relations Act,[10] which ascribes to the statutorily-created "meet and confer" committees a purpose and justification consistent with traditional notions of academic governance:

> . . . professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies.

Minn. Stat. § 179.73, subd. 1. As the court below observed, the work performed by community college faculty members in Minnesota who serve on institutional meet-and confer committees is "integral to the profes-

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sity of Delaware, *quoted and discussed in* Scott v. Univ. of Delaware, 601 F.2d 76, 79 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). Criteria similar to these are commonly used at American universities. *See, e.g.*, Clark v. Whiting, 607 F.2d 634, 636-7 (4th Cir. 1979); Carr v. Board of Trustees of the University of Akron, 465 F. Supp. 886, 891, 893 (N.D. Ohio 1979), *aff'd mem.*, 663 F.2d 1070 (6th Cir. 1981); Kunda v. Muhlenberg College, 463 F. Supp. 294, 301 (E.D.Pa. 1978), *aff'd*, 621 F.2d 532 (3rd Cir. 1980); Tyler v. College of William and Mary, 429 F. Supp. 29, 30 (E.D. Va. 1977); Pace College v. Commission on Human Rights, 38 N.Y.2d 28, 34, 339 N.E.2d 880, 882, 337 N.Y.S.2d 471, 474 (1975).

[9] See Gustad, *Policies and Practices in Faculty Evaluation*, 42 EDUC. REC. 194, 200, Table 3 (1961); Astin & Lee, *Current Practices in the Evaluation and Training of College Teachers*, 47 EDUC. REC. 361, 369, Table 4 (1966) (campus committee work considered of "major importance" in 32% of liberal arts colleges and in 41% of junior colleges).

[10] 1971 Minn. Laws ch. 33, Minn. Stat. § 179.61 *et seq.* (1980) (hereinafter the "Act" or the "Minnesota Act").

sional function of a college professor." App. 24.[11] We respectfully submit that this conclusion of the court below is unassailable as a matter of tradition and sound academic policy. So is the corollary that flows from it: a faculty member who, on the basis of nonacademic criteria, is excluded from the process by which the faculty exercises its educational policymaking authority is being deprived of an essential attribute of faculty status.

II. The Relationship Between Faculty Collective Bargaining and Institutional Governance

Collective bargaining by faculty members in higher education is a development of the last fifteen years, but even in that short time it has proved its effectiveness in advancing faculty interests.[12] In 1973, the AAUP expressly endorsed collective bargaining for teachers, researchers, and other professional higher education em-

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[11] As used herein, the abbreviation "App." refers to the Appendix to the Jurisdictional Statement filed November 30, 1982, by the appellants in No. 82-898.

[12] M. Baratz, *Shared Authority and Collective Bargaining*, 59 EDUC. REC. 193 (1978). Statistics compiled by Joseph Garbarino, Director of the Faculty Unionism Project at the University of California at Berkeley, show that the number of unionized faculty members at four-year institutions of higher education grew from 3,300 in 1968 to almost 67,000 in 1975. Over the same seven-year period, the number of unionized faculty members at two-year institutions increased from 11,000 to 35,000. J. W. Garbarino, *Faculty Union Activity in Higher Education—1975*, 15 IND. RELATIONS 119 (1976).

Professor Robert Gorman, past president of the AAUP and a nationally respected expert on labor relations, observed in 1982 that "collective bargaining represents a form of university governance in which the faculty shapes the regulations that govern the institution in personnel matters and in educational matters . . . . Collective bargaining has indeed vindicated the expectation of our membership . . . that it would be a constructive method for promoting the objectives of our Association." *The AAUP and Collective Bargaining: A Look Backword and Ahead*, 68 ACADEME 1a, 1a-3a (1982).

ployees in its *Statement on Collective Bargaining.* Through collective bargaining, the faculty not only can strengthen its collective ability to influence the distribution of an institution's economic resources, but also can work to enhance academic freedom and tenure, due process, and sound academic governance. The *Statement on Collective Bargaining* encourages the faculty representative to foster within the institution structures of governance that provide full participation by the faculty.

Models of institutional structure are described more fully in the *Statement on Government of Colleges and Universities.* Under the *Statement on Government*, the faculty acts in the first instance on all matters of educational policy:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. . . . The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.
>
> Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy.[13]

The lower court's decision indicates that subjects within the purview of the meet-and-confer committees include some matters of primary faculty responsibility, such as "new course proposals and other curriculum matters, . . . student rights and student affairs generally, . . .

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[13] *AAUP Documents* 43.

academic accreditation of the community colleges, and other matters." App. 49.

After identifying areas of primary faculty responsibility, the *Statement on Government* describes the governing mechanisms that safeguard the faculty's authority in those areas:

> Agencies for faculty participation in the government of the college or university should be established at each level where faculty responsibility is present. An agency should exist for presenting *the views of the whole faculty* . . . .
>
> The agencies may consist of meetings of all faculty members of a department, school, college, division, or university system, or may take the form of faculty-elected executive committees in departments and schools and a faculty-elected senate or council for larger divisions or the institution as a whole.[14]

As the court below observed, the meet-and-confer provision in the Minnesota Act was intended to "codif[y] a longstanding tradition of faculty participation in college governance." App. 18. The meet-and-confer committees replace "faculty senates . . . selected through elections in which every faculty member was eligible to both vote and seek election." *Id.* 20. The decision of the lower court makes it clear that faculty members who were excluded from the selection process for the meet-and-confer committees were effectively excluded from the process through which "official" faculty concerns and views were expressed. App. 20, 51. It is inconsistent with sound principles of academic collective bargaining to condition faculty participation in the formulation of educational policies on membership in a faculty union. To the extent that this has occurred in higher education in Minnesota, AAUP policies are violated.

We must, however, express an important qualification. There is a critical analytic distinction, recognized by the

[14] *Id.* 43-44 (emphasis added).

Minnesota Act, between subjects that relate to the terms and conditions of employment, such as wages, hours, and working conditions, and subjects that relate to academic policy, such as curriculum, admission, and student degree requirements. Under the Act, the former subjects come under the jurisdiction of "meet and negotiate" committees. Under the AAUP's policies as consistently interpreted and in accordance with common institutional practice, the certified bargaining agent has the right to exclude nonunion members from serving on meet-and-negotiate committees; that practice was not challenged in the court below and would not be prohibited by the holding or the reasoning of that court. Thus, the Act draws an important distinction between negotiating and conferring. The AAUP does not in this brief take a position on the correctness of the allocation of specific subjects between the meet-and-confer process and the collective bargaining process under Minnesota law. We do submit, however, that those subjects properly within "primary faculty responsibility" should be open to participation and conferring by all faculty members.[15]

III. The Application of AAUP Standards to the Governance Structures Established in Public Higher Education Under Minnesota Law

In 1977, the AAUP had occasion to examine the application of its governance and collective bargaining precepts to public-sector higher education in Minnesota. After the Minnesota Act became law in 1971, a collective bargaining agent representing faculty members at six publicly-operated state institutions negotiated a collective bargaining agreement with the trustees of the Minnesota

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[15] The lower court ordered cumulative voting for the future selection of faculty representatives to the meet-and-confer committees. *See* Appellant's Motion to Expand the Record and Add an Issue, April 28, 1983. The *Statement on Government of Colleges and Universities* contemplates, in contrast, that methods for selecting faculty participants should be designed by the faculty.

State University System. At the direction of the bargaining agent, various faculty committees on curriculum, graduate education, learning resources, and other subjects were dissolved. Simultaneously, the functions performed by these committees were transferred to newly-constituted committees operating under the aegis of the bargaining agent. Appointments to the new committees were restricted to union members. In a subsequent report, the AAUP's Standing Committee on College and University Government concluded that the new arrangement violated traditional standards of institutional governance:

> We view this restrictive practice as inimical to sound principles of academic government and of collective bargaining at an academic institution. . . . [S]ince service on faculty committees is often one of the criteria for retention, promotion, or tenure, conditioning eligibility for committee service on union membership is a potential threat to academic freedom and unfairly discriminates against faculty members who wish to exercise their right not to join the faculty's union.[16]

The cases now before the Court challenge the same restriction established pursuant to the same state statute. While taking no position on the constitutionality of the practice, the AAUP believes that, as a matter of sound academic policy, all faculty should have an opportunity to participate in the selection of meet-and-confer committees in the Minnesota Community College System. Without an open selection process, the committees cannot be said to provide a forum for the expression of the views of the entire faculty on matters of educational policy. Equal access to that forum is essential if the views of the entire faculty are to be heeded on subjects at the core of the education enterprise.

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[16] "Committee T Objects to Practices at Minnesota State Universities," 11 ACADEME 8 (June, 1977).

CONCLUSION

For the reasons set forth above, we respectfully urge the Court to be guided by two widely honored precepts of academic policy. First, a system of collective bargaining where the bargaining agent negotiates on terms and conditions of employment is not inconsistent with academic practice or AAUP principles. Second, to comport with normative academic practice as embodied in AAUP principles, faculty participation in the process for establishing educational policies should not be conditioned on the academically irrelevant criterion of union membership.

Respectfully submitted,

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No. 82-977-ATX
Status: GRANTED

Title: Minnesota Community College Faculty Association, et al., Appellants
v.
Leon W. Knight, et al.

Docketed:
December 10, 1982

Court: United States District Court
for the District of Minnesota

Vide:
82-898

Counsel for appellant: Miller,Eric R., Selzer,Donald W.

Counsel for appellee: Mueting,Donald J., Vieira Jr.,Edwin

Entry	Date	Note	Proceedings and Orders
1	Dec 10 1982	G	Statement as to jurisdiction filed.
2	Jan 19 1983		DISTRIBUTED. February 18, 1983
3	Feb 4 1983	P	Response requested. (Due March 7, 1983 - NONE RECEIVED)
4	Feb 25 1983		Memorandum of appellee Leon W. Knight, et al. filed. VIDED.
5	Mar 9 1983		DISTRIBUTED. March 25, 1983
7	Mar 28 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 82-898, and a total of one hour is allotted for oral argument.
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8	Apr 28 1983	G	Motion of appellants in No. 82-977 to expand the record and enlarge the questions presented for review filed.
10	May 3 1983		Order extending time to file brief of appellant on the merits until June 13, 1983.
11	May 9 1983		DISTRIBUTED. May 12, 1983. (Motion of appellants to expand the record & enlarge the questions presented.)
12	May 13 1983		Response requested to motion of appellants to expand the record and enlarge the questions presented for review.
13	May 18 1983		Response of appellees to motion of appellants to expand the record and enlarge questions presented filed.
14	May 23 1983		DISTRIBUTED. May 26, 1983. (Motion of appellants to expand the record and enlarge, etc.)
15	May 23 1983		Response of appellants in No. 82-898 to motion of appellants in No. 82-977 to expand the record and
16	May 23 1983		enlarge the questions presented for review filed.
17	May 31 1983		DISTRIBUTED. 6/2/83. (Motion of appellants in No. 82-977 to expand the rec. & enlarge questions presented).
18	Jun 6 1983		Motion of appellants in No. 82-977 to expand the record and enlarge the questions presented for review GRANTED.
19	Jun 8 1983		Order further extending time to file brief of appellant on the merits until June 20, 1983.
20	Jun 22 1983		Brief of appellants MN Community College Faculty Assn., et al. filed. VIDED.
21	Jun 22 1983		Brief amicus curiae of AFL-CIO filed. VIDED.
22	Jun 27 1983	G	Motion of American Association of University Professors for leave to file a brief as amicus curiae filed.
24	Jul 11 1983		Order extending time to file brief of appellee on the merits until August 17, 1983.
25	Aug 16 1983		Brief of appellees Leon W. Knight, et al. filed.
26	Jun 22 1983		Joint appendix filed. VIDED.

No. 82-977-ATX

Entry	Date	Note	Proceedings and Orders
27	Aug 19 1983		Record filed.
28	Aug 19 1983		Certified original record, 11 boxes, received.
29	Aug 23 1983		Motion of American Association of University Professors for leave to file a brief as amicus curiae GRANTED.
30	Aug 30 1983		CIRCULATED.
31	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 1, 1983. This case is consolidated with No. 82-898. (4th case) (1 hour)
33	Sep 30 1983	D	Motion of appellants in No. 82-977 to strike appellees' brief filed.
34	Oct 3 1983		DISTRIBUTED. Oct. 7, 1983. (Motion of appellants in No. 82-977 to strike appellees' brief).
35	Oct 11 1983		Motion of appellants in No. 82-977 to strike appellees' brief DENIED.
36	Oct 24 1983	X	Reply brief of appellants MN Community College Faculty Assn., et al. filed. VIDED.
37	Nov 1 1983		ARGUED.